



SCOTTISH EXECUTIVE

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Directorate of Service Policy and Planning

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(See Appendix 1 for list of consultees)

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Your ref:
Our ref: ATQ 2/7/1

7 July 2005

Dear Consultee

CONSULTATION ON Protecting Vulnerable Adults – Securing their Safety
Third consultation paper on the protection of vulnerable adults and related matters

Responding to this consultation paper

We are inviting written responses to this consultation paper by Friday 23 September 2005. **Please send your response to:**

Anne.Dagg@scotland.gsi.gov.uk

or

Vulnerable Adults Unit
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St Andrew's House
Regents Road
Edinburgh
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If you have any queries contact Anne Dagg on 0131 244 3633.

We would be grateful if you would use the consultation questions provided, which appear in the paper alongside the proposals to which they relate within the consultation. A **full list of questions asked** in this paper are set out at **Annex E** of the consultation. Please clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Executive consultation exercises, can be viewed online on the consultation web pages of the Scottish Executive website at

<http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Executive now has an email alert system for consultations (**SEconsult**: <http://www.scotland.gov.uk/consultations/seconsult.aspx>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SE distribution lists, and is designed to allow stakeholders to keep up to date with all SE consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** attached to this letter (Appendix 2) as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Executive are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Executive Library and on the **Scottish Executive consultation** web pages by 21 October 2005. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SE Library on 0131 244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next ?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on how best to improve the protection of vulnerable adults, including legislating, if necessary, when a suitable legislative opportunity arises. We also intend to consult with you again on a regulatory impact assessment as soon as is practically possible after consultation analysis.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Anne Dagg at the address above.

Yours sincerely

Jean MacLellan

Protecting Vulnerable Adults – Securing their Safety**Third consultation paper on the protection of vulnerable adults and related matters****Consultees**

Academy of Royal Colleges and Faculties in Scotland
ACPOS
Action of Churches together in Scotland
Association of Directors of Social Work
Association of Scottish Colleges
Advocacy Safeguards Agency
Advocates Library
Apex Trust
Archdiocese of Glasgow Social Services
British Association of Social Workers
British Dental Association (Scotland)
British Federation of Care Home Proprietors
British Geriatrics Society (Scotland)
British Medical Association Scotland
British Psychological Society
British Psychological Society Division of Clinical Psychology
Care Commission
Carers organisations
Centre for Independent Living in Glasgow
Chief Constables
Chief Executives, Local Authorities
Chief Executives, NHS Boards
Chief Executives, NHS Boards Operating Divisions
Church of Scotland
Church of Scotland Board of Responsibility
Citizen's Advice Bureau
College of Occupational Therapy
Commission for Racial Equality
Commissioner for Local Administration in Scotland
Communities Scotland
Community and District Nursing Association
Community Psychiatric Nurses Association
CoSLA
Crown Office
CVS Scotland
Directors of Social Work, Local Authorities
Disability Rights Commission Office for Scotland
Disclosure Scotland
Equal Opportunities Commission
Equality and Human Rights Reference Group
Equality Network
General Medical Council
Housing Associations
Inclusion Scotland
Law Society of Scotland
Legal Services Agency
Lord President and Lord Justice General, High Court of Justiciary
Medical & Dental Defence Union of Scotland
Medical Defence Union
Medical Protection Society
Mental Welfare Commission
Minority Ethnic Groups
NHS Health Scotland
NHS National Services Scotland
Nursing and Midwifery Council
Office of the Public Guardian
Royal College of Anaesthetists
Royal College of General Practitioners
Royal College of Nursing and Midwifery
Royal College of Nursing Scotland
Royal College of Physicians
Royal College of Psychiatrists (Scottish Division)
Royal College of Speech Therapists
SACRO
Scottish Association of Care Home Owners
Scottish Association of Health Councils
Scottish Association of Sign Language Interpreters
Scottish Care
Scottish Consortium for Learning Disability
Scottish Council for Community and Voluntary Organisations
Scottish Council of Independent Care
Scottish Further Education Colleges
Scottish General Practitioners Committee
Scottish Health Service
Scottish Higher Education Institutes
Scottish Human Rights Centre
Scottish Independent Advocacy Alliance
Scottish Information Commissioner
Scottish Institute of Human Relations
Scottish Inter Faith Council
Scottish Legal Aid Board
Scottish Law Commission
Scottish National Commission for Catholic Social Care
Scottish Police College
Scottish Police Federation
Scottish Prison Service

Scottish Refuge Council
Scottish Social Services Council
Scottish University and College Research
Centres
SCRE
SCVO
Sheriff Principals
Sheriffs' Association
Scottish Independent Advocacy Alliance
Social Care Association
Social Service Board of the Episcopal Church
of Scotland
Social Work Inspection Agency
State Hospital for Scotland
STUC
Unison
Universities Scotland
Victim Support (Scotland)
Voluntary organisations in the field of equality
Voluntary organisations in the field of
learning disability and ASD
Voluntary organisations in the field of mental
health
Voluntary organisations in the field of older
people
Voluntary organisations in the field of
physical disabilities
Voluntary organisations in the field of sensory
impairment
Voluntary organisations that provide care
services
Voluntary organisation that provide supported
accommodation
Volunteer Development Scotland
Vulnerable Adults Alliance Scotland

RESPONDENT INFORMATION FORM

Protecting Vulnerable Adults – Securing their Safety

Third consultation paper on the protection of vulnerable adults and related matters

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)

(a) as an individual go to Q2a/b and then Q4

(b) **on behalf of** a group/organisation go to Q3 and then Q4

INDIVIDUALS

2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?

Yes (go to 2b below)

No, not at all We will treat your response as confidential

2b. Where **confidentiality is not requested**, we will make your response available to the public on the following basis (please tick **one** of the following boxes)

Yes, make my response, name and address all available

Yes, make my response available, but not my name or address

Yes, make my response and name available, but not my address

ON BEHALF OF GROUPS OR ORGANISATIONS:

3 The name and address of your organisation **will be** made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your **response** to be made available?

Yes

No We will treat your response as confidential

SHARING RESPONSES/FUTURE ENGAGEMENT

4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?

Yes

No

Protecting Vulnerable Adults – Securing their Safety
Third consultation paper on the protection of vulnerable adults and related matters

Closing date for responses Friday 23 September 2005

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Table of definitions

The following words have the following meanings:

“The 1948 Act” means the National Assistance Act 1948

“The 1968 Act” means the Social Work (Scotland) Act 1968

“The 1983 Act” means the Mental Health Act 1983, applicable to England and Wales.

“ The 1984 Act” means the Mental Health (Scotland) Act 1984

“The 1995 Act ” means the Criminal Procedure (Scotland) Act 1995

“The 2000 Act” means the Adults with Incapacity (Scotland) Act 2000

“The 2001 Act” means the Regulation of Care (Scotland) Act 2001

“The 2003 Act” means the Mental Health (Care and Treatment) (Scotland) Act 2003

“ the assessment conditions” means the conditions set out in paragraphs 29.1.1 to 29.1.3 of Annex D

“The MHRT” means the Mental Health Review Tribunal, as defined under section 65 of the 1983 Act.

“The Commission” means the Mental Welfare Commission for Scotland

“The SLC” means the Scottish Law Commission

“The Tribunal” means the Mental Health Tribunal for Scotland

1. Introduction

1.1 This consultation paper is the third in a series about the protection of vulnerable adults. It brings together several strands of policy thinking around vulnerability dating back to 1997 with a view to co-ordinating them into a coherent whole. If the outcome of this exercise supports legislation then we will introduce a Vulnerable Adults Bill to the Scottish Parliament when a suitable opportunity arises.

Previous consultation papers

1.2 The first consultation in 2002 asked if a new legislative framework was needed to protect vulnerable adults. Specific proposals included rights of entry to settings where abuse was alleged and exclusion orders for perpetrators. Further information on this consultation is available on www.scotland.gov.uk/socialresearch. **Annex A lists the consultation questions that were asked then.**

1.3 The second consultation paper www.scotland.gov.uk/consultation/issued in February 2004 focused on the policy intention to identify, and make known to prospective employers, people considered unsuitable to work with vulnerable adults either as paid employees or unpaid volunteers. The intention is to achieve this by creating a List of people disqualified for working with vulnerable adults.

1.4 Respondents to this consultation (**summarised at Annex B**) were universally in favour of the proposal, recognising the delicate balance that will need to be struck between protecting those who are vulnerable whilst enabling them to lead as independent lives as possible. It was also acknowledged that a balance will also need to be struck in upholding the rights of the service user and those staff who are being investigated.

1.5 The class of person included within “vulnerable adult” for the purposes of the List are those who are aged 16 and over to whom:

- accommodation, and nursing or personal care are provided in a care service;
- personal care is provided in their own home under arrangements made by a domiciliary care agency; or
- prescribed services are provided by an NHS Board, or an individual hospital, independent clinic or independent medical agency, or NHS body that is registered with the Care Commission.

As there have been significant legislative and policy changes in this area, we are seeking your updated views on the first consultation paper as well as this paper. **A list of the questions in the first consultation paper** is appended as **Annex A**. Further observations are not requested on the second consultation as it issued only last year.

This consultation paper

1.6 The aim of this paper to seek comments on proposed **protection measures for:**

- (a) **vulnerable adults**. This is discussed in detail in **sections 2 and 3 of this paper**; and

(b) **people with a learning disability.** This is discussed in detail in **section 4 of this paper.**

The questions upon which your views are sought appear in the paper alongside the proposals to which they relate. A **full list of questions asked** in this paper are set out at **Annex E of this paper.**

2. **Protection measures for vulnerable adults**

2.1 The purpose of this part of the consultation paper is to seek comments on proposals relating to protection measures for adults whom it is suspected may be vulnerable and at risk from abuse.

Overview of policy

2.2 We propose to confer on public authorities:

- a duty to investigate where a vulnerable person, or a person suspected of being vulnerable, seems to be at risk from abuse;
- a power to contact the person and inspect the premises where he or she is;
- a power to carry out or instruct relevant assessments of the person and their circumstances;
- a power to intervene to remove or manage the risk of abuse;
- if necessary and in the last resort, to exclude the perpetrator;
- if necessary and in the last resort, a power of forcible entry to perform the above functions;
- a duty to establish multi-agency Adult Protection Committees to jointly manage adult protection policies, systems and procedures at a local level.

Definition of vulnerability for the purposes of the proposed protection measures

2.3 We consider that the proposed new powers and duties should apply in relation to persons aged 16 or over who are vulnerable.

2.4 For this purpose, we consider that persons are vulnerable if they:

- are unable to safeguard their personal welfare, property, or financial affairs.
- may be in need of community care services by reason of mental disorder or disability, age or illness.
- are unable to care for themselves, or unable to protect themselves against significant harm or exploitation.

2.5 It is imperative to be clear who a vulnerable adult is. Respondents to earlier consultations raised a range of concerns about the danger of having a definition that is so tightly constructed that it serves as a barrier to services or that it is so loose that services may have considerable increased demands placed upon them. There is also the need to ensure that there is clarity about what protections are afforded through this definition and that those complement and mesh with existing statute, systems, procedures and processes.

Question 1: Do you agree with the revised definition of a vulnerable adult?

Question 2: If you do not agree with the revised definition of a vulnerable adult, what changes do you think require to be made of it?

Definition of abuse

2.6 Our intention is to define “abuse” as a single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes the adult distress.

Question 3: Do you agree with the definition of abuse?

Question 4: If you do not agree with the definition of abuse, what changes do you think require to be made?

Who abuses and who investigates

2.7 Vulnerable adults may be abused by a wide range of people including family, friends, professional paid staff, volunteers and other service users. This means that investigative procedures will be conducted in a wide range of settings, including regulated services. Whilst the Care Commission regulates care services through registration, inspection and enforcement action, we propose that specially formed Adult Protection Committees should lead on investigating allegations of abuse in all settings, including allegations of abuse in regulated care settings. Further proposals relating to the formation of Adult Protection Committees are detailed in paragraphs 2.22 to 2.27.

Question 5: Do you agree that Adult Protection Committees should lead the investigation of abuse, including investigations of abuse in regulated care services?

Question 6: If you do not agree, what objections do you have and what alternatives do you consider possible or desirable?

2.8 This part of the paper focuses on the measures proposed for vulnerable adults proposals only. It does not discuss the provision of related health or social care. Set out below are:

- an overview of the existing law and practice relevant to the area;
- the problems identified and perceived with the law and practice; and
- the proposed changes in more detail.

Current law and practice relating to protection of vulnerable adults

2.9 In the introduction to their 1993 discussion paper on Vulnerable Adults¹, the Scottish Law Commission (“SLC”) observed that there was “little or nothing available”² to protect

¹ “Discussion Paper on Mentally Disordered and Vulnerable Adults: Public Authority Powers”, Scottish Law Commission Discussion Paper No 96 (August 1993). An electronic copy of the document is available on their website: http://www.scotlawcom.gov.uk/downloads/dp096_vulnerable_adults.pdf

² Scot Law Com No 96 (1993), at page 1.

adults who are vulnerable but not mentally disordered and that there is “an increasing awareness that abuse, deprivation and exploitation of vulnerable adults generally occurs and that the existing law is often not capable of tackling it effectively”³.

2.10 Whilst there have been advances since then in the protection of adults who lack capacity and adults who are mentally disordered by the 2000 Act and, prospectively, by the 2003 Act, the position of those vulnerable adults mentioned in SLC’s discussion paper remains largely the same.

2.11 The relevant existing statutory provisions available to public authorities are:

- A power to demand admission to premises where a mentally disordered person is⁴.
- A power of forcible entry to premises where a mentally disordered person is and removal of that person to a place of safety⁵.
- A power to remove a person suffering from chronic disease or living in unsanitary conditions who lacks proper care and attention from home to a hospital or other place⁶.
- A power to take mentally disordered people found in a public place and in need of care to a place of safety⁷.
- A power of entry and inspection of residential and other accommodation provided by a local authority, voluntary organisation or other person under the Social Work (Scotland) Act 1968 (for example care homes).⁸

There are also various powers contained in the 2003 Act which is expected to be brought into force in October 2005. These are:

- A power to enter premises in order to take a person over 16 who has, or appears to have, a mental disorder to any place authorised under the 2003 Act.
- A power to enter premises to remove to a place of safety a person over 16 with a mental disorder who is at risk and is likely to suffer significant harm if not removed to a place of safety.
- A power to remove a person reasonably suspected to have a mental disorder from a public place to a place of safety.

2.12 There are some limited common law powers of entry without warrant available to the police, although these are primarily limited to dealing with serious disturbances or when actively in pursuit of persons who have committed serious crimes.

2.13 Many local authorities have multi-disciplinary vulnerable adult policies in place which are at different stages of development. In some areas, vulnerable adults are able to

³ *Ibid.* at page 3.

⁴ Mental Health (Scotland) Act 1984 (“the 1984 Act”), section 117(1).

⁵ The 1984 Act, section 117(2).

⁶ The National Assistance Act 1948, section 47 (as amended).

⁷ The 1984 Act, section 118.

⁸ The Social Work (Scotland) Act 1968, section 6.

access systems and processes that either protect children and young people or those who may be subject to domestic violence.

2.14 There are also some over-arching Adult Protection Committees in existence, although structures, roles and responsibilities vary. Whilst this may result in genuine multi-disciplinary working, the present picture is of one discipline (usually Police or Social Work) being in the lead.

Problems identified with current law and practice

2.15 As will be seen from the list at paragraph 2.11 of this paper, there is no general statutory duty on public authorities to investigate where a vulnerable person, or a person suspected of being vulnerable, seems to be at risk from abuse.

2.16 Given its covert nature, there are no accurate prevalence and incidence rates of elder abuse as studies tend to be small in scale and may subsequently be questioned in terms of representation and validity. Older people may not wish to disclose abuse for a variety of reasons ranging from dependence on the perpetrator to fear of reprisal. So elder abuse in the United Kingdom is emerging as a social problem on the basis of anecdotal evidence from social and healthcare professionals.

2.17 Age Concern Scotland now has an Elder Abuse Project which aims to raise awareness and improve intelligence gathering. It estimates that between 7% and 9% of older people in Scotland are victims of at least one form of abuse, with over 40% of victims experiencing more than one kind of abuse.

2.18 Abuse is not confined to older people as the Mental Welfare Commission has highlighted in its Deficiency in Care reports (www.mwescot.org.uk/). Most recently, the Commission worked closely with the Social Work services Inspectorate (now the Social Work Inspection Agency (SWIA)) in investigations into Scottish Borders Council and NHS Borders services for people with learning disabilities, the findings of which were published in May 2004.

2.19 These investigations related to the circumstances of a woman who was considered to have a learning disability who had multiple injuries from physical and sexual assault. Other individuals who were receiving care under the same circumstances had varying degrees of learning and physical disabilities and mental health needs.

2.20 The findings highlighted a failure to investigate very serious allegations of abuse appropriately, because of a lack of understanding of the legislative framework for intervention and its capacity to provide protection. This was compounded by a failure to understand the complexities of child/adult protection and of the need to explore all allegations of abuse and the possible reasons for retraction of these. There was also a failure to undertake appropriate risk assessment which may have assisted in balancing issues of self-determination and protection.

2.21 As the Borders case illustrates, having structures and procedures may be insufficient. Whilst it is important that each area has the flexibility to meet the needs of its own community, it is essential to have consistent high quality assessment and intervention to recognised national standards which is led and managed by local specialist Adult Protection Committees. The boundaries between protection of adults from abuse (including

investigation of allegations of abuse) and supporting those who are subject to domestic violence will also need to be drawn.

Proposed changes in more detail

2.22 To ensure that there are appropriate structures and procedures in place across Scotland, it is proposed that all public authorities should have formally constituted Adult Protection Committees along the lines of those that exist for children and young people. Such committees will have a dual function – protection of vulnerable adults from abuse and detection of abuse of vulnerable adults.

2.23 It is proposed that the Adult Protection Committee should be a standing committee of lead officers covering all disciplines involved. It will have a clearly defined remit and lines of accountability as well as clear objectives and priorities. Its main function will be to:

- identify the role, responsibility, authority and accountability of each agency or group to protect vulnerable adults;
- establish mechanisms to develop policies and strategies, ensuring that users and carers are actively engaged in this;
- develop procedures that identify concern factors and the means of dealing with referrals;
- produce guidance on management, complaints and grievances and allegations of malpractice;
- devise, implement and evaluate appropriate education and training programmes;
- create appropriate information-sharing policies, procedures and practices;
- monitor and review the implementation and impact of policy; and
- lead investigations into alleged abuse of vulnerable adults.

2.24 The actions available to the Adult Protection Committee and those who work on their behalf also need to be clarified. The organisational structure and lines of accountability of this multi-disciplinary entity need to be made explicit and be understood by all those involved to avoid communication breakdown and its potential consequences.

2.25 The duties of front line staff who investigate, intervene, monitor and evaluate also need to be made explicit. The SLC saw a right of entry as vital. In addition, it may be appropriate, when abuse becomes a criminal matter, to define case conferencing arrangements, the risk assessment that is to be undertaken, the role of mediation and the steps for review and closure of investigations.

2.26 Practitioners suggest that exploring the possibility of mediation where abuse has taken place is critical as practical experience indicates that some abuse takes place because of the stresses of caring and being cared for. Both parties may sometimes wish to continue to live together. Mediation is thought to be a valuable means through which to review what has happened and to agree a plan for the future, based on risk assessment of the factors that led to the abuse.

2.27 The SLC also recommended the introduction of expulsion orders to exclude any perpetrator of abuse who shared a home with the vulnerable adult to prevent the latter from the potential of losing their home in addition to coming to terms with having been abused. We are keen to ascertain whether this type of intervention may be appropriate and would welcome comments on the circumstances in which it could apply. This will require careful resolution if the vulnerable adult and the perpetrator live in the same regulated service.

Question 7: Should the structure and powers of Adult Protection Committees be defined in statute or a statutory instrument or not?

Question 8: When abuse of a vulnerable adult is proved, what risk assessment and management should take place?

Question 9: Do you agree that mediation should be offered to all those who are subject to abuse? If you do not agree, please state your key reservations.

Question 10: If mediation were to be offered, how could this be done?

3. Protection measures for adults with a learning disability

3.1 The purpose of this part of the consultation paper is to find out if any further measures are required in addition to the 2000 Act and the 2003 Act to meet the needs of those aged 16 or over with a learning disability, particularly those who offend or who are at risk of offending or re-offending. It analyses the 2000 Act as it operates now and the 2003 Act as it will operate when it is fully in force. As the 2003 Act is not yet fully operational, the benefits it will bring to those adults with a learning disability is yet to be tested. **A summary of the 2000 Act is appended as Annex C and a summary of the 2003 Act is appended as Annex D.**

3.2 You are asked to give your perspective on both sets of provisions and to outline any gaps that you anticipate will exist between them when the 2003 Act is fully in force, which is expected to be in October 2005. In this way, due attention can be paid to consideration of fulfilling recommendations made in the Millan Report about meeting the needs of this group fully.

3.3 A recent paper (Gordon, 2003) reviews the interface between the Acts which provide for a similar, but not identical, population of adults, including people with a learning disability. There may also be times when adults may be subject to both Acts, or where there is a choice of appropriate legislation under which action may be taken in respect of an adult with a learning disability.

3.4 The 2000 Act focuses on the protection of adults who lack short or long-term capacity to make decisions for themselves. It has been estimated that as many as 100 000 people

may benefit from the changes brought about by the 2000 Act by safeguarding adults who are assessed as incapable of acting, making, communicating or understanding some or all decisions because of mental disorder, or an inability to communicate caused by a physical or other disorder.

3.5 The 2003 Act will provide a framework for the care and treatment of individuals with a mental disorder, which is defined as mental illness, learning disability, and personality disorder, however caused or manifested.

Use of the 2000 Act for people with learning disabilities

3.6 The 2000 Act has been operational since 2001 (2002 in the case of Part 6, 'Intervention and Guardianship Orders'). Since then the use of guardianship orders under the 2000 Act has shown a significant increase for people with learning disabilities (as with other client groups, in particular people with dementia).

3.7 The Commission has provided an analysis of the data on guardianship application received between 2002 and 2004. In these two years there were approximately 660 applications granted for guardianship orders. The table below provides information by local authority area for guardianship orders granted between 2002 and 2004 in relation to persons with a learning disability.

Statistical Report on Learning Disability Welfare Guardianship Orders Received 2002/04

(This excludes Tutor Datives and applications ended before court decision)

LOCAL AUTHORITY		Per 100k	Status of Applicant	Percent
ABERDEEN CITY	8	4.6	Local Authority	150 78
ABERDEENSHIRE	15	8.4	Relative	37 19
ANGUS	14	15.9	Solicitor	2 1
ARGYLL & BUTE	6	8.2	Carer	0 0
CLACKMANNANSHIRE	0	0.0	Self	1 1
DUMFRIES & GALLOWAY	3	2.5	Citizen Advocate	1 1
DUNDEE CITY	4	3.4	Joint	1 1
EAST AYRSHIRE	2	2.1	Total	192 100
EAST DUNBARTONSHIRE	2	2.3	Status of Guardian	Percent
EAST LoTHIAN	8	11.1	Local Authority	140 73
EAST RENFREWSHIRE	1	1.4	Relative	43 22
EDINBURGH, CITY OF	13	3.5	Solicitor	2 1
FALKIRK	5	4.3	Carer	0 0
FIFE	6	2.1	Joint	6 3
GLASGOW CITY	14	2.8	Citizen Advocate	1 1
HIGHLAND	18	10.9	Total	192 99
INVERCLYDE	0	0.0	Type of Incapacity	Percent
MIDLoTHIAN	1	1.5	Acquired Brain Injury	0 0
MORAY	11	16.2	Alcohol Related Disorders	0 0
NORTH AYRSHIRE	0	0.0	Dementia/Alzheimers	0 0
NORTH LANARKSHIRE	10	3.9	Learning Disability	159 83
ORKNEY	0	0.0	Mental Illness	0 0
PERTH & KINROSS	14	13.0	Multiple diagnoses	33 17
RENFREWSHIRE	2	1.4	Personality Disorder	0 0
SCOTTISH BORDERS	9	10.4	Other	0 0
SHETLAND ISLANDS	0	0.0	Total	192 100
SOUTH AYRSHIRE	2	2.2	Interim Order Sought	Percent
SOUTH LANARKSHIRE	12	4.9	No	131 68
STIRLING	2	3.0	Yes	61 32
WEST DUNBARTONSHIRE	2	2.7	Total	192 100
WEST LoTHIAN	6	5.0	Gender	Percent
WESTERN ISLES	2	9.0	Male	102 53
TOTAL	192	4.7	Female	90 47
			Total	192 100

By Age Group		Percent	Period of Approval	2004	%
Under 20	21	11	1 year	6	3
20 – 29	38	20	2 years	4	2
30 – 39	36	19	3 years	113	59
40 – 49	38	20	5 years	5	3
50 – 59	26	14	Not Stated	10	5
60 – 69	18	9	Indefinite	51	27
70 – 79	9	5	Other	3	2
80 – 89	6	3	Total Approved	192	100
Over 90	0	0			
Total	192	100			

3.8 Adults with only a learning disability were the subjects of 159 of these orders, with additionally, adults with a learning disability and another disability such as dementia or mental illness being subjects of approximately a further 33 orders. Combined this means that 192 guardianship orders were made for those with a learning disability during this period, which is a little under one third of the total guardianship orders granted during that period (29%). 57% of the orders for adults with a learning disability were for men, and this may indicate a larger control element.

3.9 Of the 660 guardianship orders, 21 were granted on adults under the age of 20 and all of these (100%) were for adults with a learning disability. In total 104 guardianship orders were granted for adults under 40, and 95 of these (91%) were adults with a learning disability. Of the 192 adults with a learning disability 159 (82%) were under the age of 60. Of the 660 guardianship orders granted 436 (66%) were for adults over 60.

3.10 Across Scotland the general rate of usage of guardianship orders in different local authority areas varies a great deal from less than 10 per hundred thousand in 10 areas, to over 20 per hundred thousand in 9 areas (out of 32 local authority areas). The percentage use of guardianship for adults with a learning disability also varies greatly. In one area there were no orders granted for adults with a learning disability from a total of 21 orders (0%). In another area 8 out of 12 orders were for adults with a learning disability (75%). In 3 areas the number of orders for adults with a learning disability represented less than 10% of their total, in 5 areas it represented more than 50%. The average across the country is 24%.

3.11 Some of the variations in use of guardianship orders for adults with a learning disability can possibly be explained by these two factors: a local authority's interpretation of the legislation, and whether there has been a hospital closure within its boundary.

Guardianship Powers and Adults with a Learning Disability

3.12 It is clear from some applications for guardianship orders that a lot of thought has gone into being very specific about the powers the guardian requires to control the behaviour, or limit the access to vulnerable groups, of some adults with a learning disability. Here are some examples:

- Make decisions regarding proximity to groups of children and vulnerable adults; Accompany at all times in the community and at leisure and identify appropriate work experiences; Accompany him to public toilets; Accompany him on visits to family home;
- To decide with whom adult is to live with and consort with; to decide where adult should work, the nature of the work and for whom; to decide whether adult should apply for any licence, permit, or other authorisation.
- Be accompanied at all times by appropriate person. Behaviour to be monitored. External gate should remain locked and key kept by appropriate person. His bedroom window should remain frosted.
- To make decisions re personal care and social welfare, including power to follow a behaviour management programme.

- Wide ranging powers sought to escort, check on, make decisions for, and otherwise control client.

Where either the adult or someone else does not comply with a decision of a guardian with powers relating to the personal welfare of an adult, the guardian can apply to the sheriff for an order requiring the adult or any person named in the order to implement the guardian's decision if the adult or other person might reasonably be expected to comply with the decision.

Question 11: Do you agree that guardianship is the most appropriate method to protect and control some people with a learning disability who may also exhibit challenging behaviours?

Question 12: If you do not agree, what alternative methods could be provided other than detention under the 2003 Act?

Use of the 2003 Act for people with a learning disability

3.13 The 2003 Act is expected to become operational in October 2005. There is, therefore, no information as yet on how its provisions will work in practice. It will cover all those with a mental disorder which is defined as any mental illness, personality disorder or learning disability. So those with a learning disability without further mental illness or personality disorder will be covered by the Act.

3.14 The recent audit of information held by the Commission has identified that there are 7 people who are detained under the 1984 Act and who also have a guardianship order which relates to their welfare. It is expected that many more people with learning disabilities will be subject to section 47 of the 2000 Act but this information is not currently collected or analyzed.

3.15 The objective of the 2003 Act is to ensure the effective care and treatment of people with mental disorders. Its guiding principles apply to all people covered by the 2003 Act and are designed to benefit all individuals with mental disorders, not just those who receive treatment under the 2003 Act. This has particular relevance for people with learning disabilities. There are increased rights for service users and family carers and increased safeguards with options for compulsory treatment in the community as well as hospital settings. The care and treatment of mentally disordered offenders is also affected by the 2003 Act.

3.16 A study was undertaken in 1999 to investigate the use of the mental health legislation for people with a learning disability. At that time there were 178 people who were detained in hospital who had a diagnosis of learning disability. Approximately a third of these people were detained on the ground of a coexisting mental illness with the remainder detained on the basis of criminal procedures or to manage problematic behaviour. This data may be an under representation.

3.17 The Commission's audit findings appear in the table below.

Details of Audit

Numbers of people detained under the 1984 Act or the Criminal Procedure (Scotland) Act 1995 on the 22nd September 2004: 218

Age:

16-25 - 37 26-35 - 51 36-45 - 66 46-55 - 49 56-65 - 1 65+ - 4

Sex: 43 male and 175 female

Type of detention:

Section 26 - 4
CCO - 4
CPA - 47
Section 18 - 160
Section 25 - 4

Reason for detention:

95 mental illness (with impairment or severe impairment)
123 mental impairment (99) or severe mental impairment (24) and
criminal behaviour or other behaviour

Length of detention

Under 1 year - 55
1-2 years - 41
3-5 years - 33
6-10 years - 45
11-15 years - 24
16-20 years - 10
21-25 years - 3
Over 25 years - 7

Two recent cases have been decided in relation to detention of incapable adults. These cases are:

- the judgment from the European Court of Human Rights, *HL v the United Kingdom* dated 5 October 2004 (“the Bournemouth judgment”) and
- the Court of Appeal judgment *R (on the application of MH) v Secretary of State for Health*, dated 3 December 2004 (“the MH judgment”).

The cases are summarized below. The implications of these cases are being considered by the Scottish Executive at present and are therefore outwith the scope of this consultation paper.

The Bournemouth judgment

The Bournemouth judgment is a case originating in the English courts which was appealed to and decided by the European Court of Human Rights about legal safeguards and fair and

proper procedures are required in respect of incapacitated patients who are informally detained in hospitals or persons who are resident in care homes.

Facts of the case

Mr L is incapable of giving consent or objecting to medical treatment. He had been cared for in Bournemouth Hospital for some 30 years until March 1994 when he was discharged to live with paid carers on a trial basis.

This arrangement appeared to be working well until July 1997 when he was effectively removed from his existing carers in the community and readmitted to Bournemouth once more when he became agitated when making his weekly visit to a day care centre run by a local authority.

In line with standard practice, Mr L was not compulsorily detained under the 1983 Act but admitted on an “informal” basis, under the common law doctrine of necessity, because he was compliant and did not resist admission. The consultant in charge of Mr L subsequently advised his carers (on clinical grounds) not to visit him initially, due to concerns that he would think he would be able to leave with them. Mr L was in fact formally detained in December 1997 following a Court of Appeal ruling that he had been unlawfully detained.

Through his carers Mr L sought judicial review of the decision to admit him to hospital, his release from the hospital and damages for false imprisonment and assault.

Decision of the European Court of Human Rights

The European Court of Human Rights in Bournemouth considered that Article 5(1) of the European Convention on Human Rights requires the existence in domestic law of adequate legal protections and “fair and proper procedures”. Reliance on the doctrine of necessity for admission or treatment of such patients was arbitrary due to the lack of procedural safeguards and therefore unlawful. Such safeguards are required to protect individuals against any misjudgment or professional lapse of the relevant health care professionals. The court therefore found that Article 5(1) of the European Convention on Human Rights was breached in Mr L’s case. The court also found that it had not been demonstrated that Mr L had available to him a procedure to have the lawfulness of his detention reviewed by a court.

The MH judgment

The MH judgment is another English case about whether there must be an automatic review procedure for each patient detained under mental health legislation who is unable on their own initiative to exercise the right of appeal afforded to them under that legislation.

Facts of the case

MH is a single woman in her 30s with severe learning disability as a result of Down's syndrome. She was detained for assessment under section 2 of the 1983 Act on 31 January 2003. Section 2 of the 1983 Act provides for the admission and detention for assessment of a person on the ground that he is suffering from a mental disorder of a nature warranting such detention, and that he needs to be detained in the interests of his own health and safety or that of others. MH’s doctor recommended that, on discharge, she should be subject to

guardianship under the Act. However, no application for guardianship could be made because her nearest relative (her mother) objected to such an order being granted. The mother also sought to have MH discharged under section 23 of the 1983 Act (which was vetoed by the patient's doctor.)

The local authority applied to the county court to displace the mother as nearest relative under the 1983 Act. Sections 2 and 29(4) of the 1983 Act operate so that detention under section 2, which would otherwise end after 28 days, continues until the application for displacement of the nearest relative is determined. As a result, MH remained in hospital under section 2 until 21 July 2003.

During this extended period of detention, neither MH nor her nearest relative were able to apply to the MHRT for her discharge. Although MH had the right to apply to the MHRT during the initial 14 days of her detention, she was unable in practice to exercise this right because she lacked the capacity to do so. In the event, her case was in fact considered by an MHRT on 26 March 2003 pursuant to a reference by the Secretary of State for Health. That Tribunal determined that she should not be discharged.

MH applied to the High Court claiming that her rights under Article 5 of the ECHR (right to liberty) had been violated. In its judgment on 22 January 2004, the Court found against her, primarily because detention under section 2 of the 1983 Act is of an "inherently short duration."

MH then applied to the Court of Appeal, on the same grounds as at the High Court. MIND, a mental health charity in England & Wales, applied to become an interested party to proceedings, supporting the argument that there should be automatic reference to an MHRT for all incapable patients detained under section 2 (not just those whose detention had been extended under section 29) since such patients cannot exercise their rights by applying themselves.

Decision of the Court of Appeal

The Court of Appeal found against the Department of Health. The court held that the state was obliged to place an incompetent patient in the same position as a competent patient with regard to access to the MHRT. Therefore, in circumstances where a competent patient had a right to apply to the MHRT, a mechanism had to be provided for the automatic referral of the case of an incompetent patient to the MHRT. The absence of any such mechanism within the 28 day period provided for under section 2 of the 1983 Act rendered it inconsistent with Article 5(4) of the ECHR. Similarly, an incompetent patient such as MH should have had the right to return to the MHRT to obtain a judicial decision on her continued detention.

The Case for Change – Is there a need to add to existing legislation to further protect some people with a learning disability?

3.18 The Millan report recommended that *there should be an expert review at an early date on the position of learning disability within mental health law*. This review should consider:

- Implications of the Scottish Executive review of learning disability services for legislation affecting people with learning disability, including mental health law.

- Experiences from jurisdictions with different arrangements in respect of learning disability and compulsory care.
- Whether it is feasible and desirable to make separate provision for the compulsory care of people with learning disabilities, outwith the mental health act.
- The experiences of people with learning disabilities who have been detained under the 1984 Act, including their treatment and outcomes.
- What measures might be taken to ensure that arrangements for people with learning disabilities who offend meet the needs of offenders and society.

3.19 In addition, *The same as you?* articulates the principles governing policy development and provision of services for children and adults with learning disabilities. The closure of all long stay learning disability hospitals by 2005 is leading to the development of a range of community based services, with a small number of assessment and treatment in patient beds available.

Experience from Other Jurisdictions

3.20 The main source of information to date has been from New Zealand in relation to changes to their Mental Health Act in 1992. At that time people with learning disabilities were excluded from the Act unless they also had a mental illness. This exclusion created a legislative gap, in particular for people with a learning disability who offend, resulting in an inappropriate placement in prison, forensic mental health services or people offending and not being charged because families and services did not want people to be subject to the criminal justice system.

3.21 In 1997 the government decided to proceed with the development of new stand alone legislation which would allow for more appropriate options for disposition for people with a learning disability who offend. At that time the legislation was to cover people whose behaviour posed a serious risk of danger to themselves or others whether their behaviour was criminal or not. However during the examination of the Bill the government decided to limit coverage to offenders, place a strong emphasis on rehabilitation, and utilise funding for the Bill to address service gaps in the non offender group.

3.22 Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 was implemented in October 2004 and along with the Criminal Procedure (Mentally Impaired Person) Act 2003 allows the New Zealand courts to make a compulsory care order for people with a learning disability who are charged with or convicted of a criminal offence. A compulsory care order provides two different levels of care- secure care (hospital level or community based) and supervised care (a range of settings). A number of new measures have been introduced to ensure appropriate assessment, care, treatment and rehabilitation for people with learning disabilities who have offended.

3.23 The New Zealand legislation provides similar protection, care and treatment to that afforded by the 2003 Act and the Criminal Procedures Act 1995, but the New Zealand Act is specific to people who have offended.

3.24 In New Zealand people who are not offenders but whose behaviour presents a risk to themselves or others are not necessarily subjected to any statutory provision, but there is an obligation on services to provide appropriate assessment, care and rehabilitation services with additional investment being made to address this. There is no such provision in Scotland other than recourse to the 1984 Act or in a small number of cases the 2000 Act.

3.25 In New Zealand people with challenging behaviour who are at risk to themselves or others and who may have a more severe learning disability will be charged with an offence and subject to the Criminal Procedure (Mentally Impaired Person) Act 2003. However, such people will likely be considered 'unfit to plead' and diverted to the protection of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. For some people with challenging behaviour who mainly are presenting a risk to themselves i.e. self injury, there is an option of using a welfare guardianship order.

3.26 It will take time to develop a sufficient database to identify how this new statutory framework is meeting the needs and rights of people with a learning disability. The implications of the United Nations Convention on the Rights of Disabled People are likely to have an impact on the way legislation is applied with potential grounds for discrimination.

Issues

3.27 The recent evaluation of the first three years of operation of the 2000 Act (Killeen 2004) indicates that as people become more aware of the extended range of options, and more familiar and confident with the procedures, patterns of use are changing. There are wide variations across the country which may be attributable to familiarisation, differences in local authority procedures and differences in population and socio-economic structures. Some procedures, notably the least restrictive such as intromission of funds and intervention orders, are not being used extensively. It is also clear that relatives play a key role as applicants and proxies across all of the procedures.

3.28 The circumstances in which it is necessary to invoke the 2000 Act was the most complex issue as far as local authorities and the Commission are concerned. This centred on whether the 2000 Act should be invoked every time a major intervention is needed or only when there is a dispute or conflict of interest. Following legal advice, the Scottish Executive wrote to authorities and made clear that whether an order is required under the 2000 Act depends on the circumstances of each case. (Social Work Services Inspectorate letter July 2004)

3.29 In some circumstances the powers and duties contained in the 1968 Act will be sufficient. In others e.g. resistance from a family or opposition from an adult will indicate the need for an order. Any decision not to obtain an order will clearly carry with it some risk of challenge. But judgements have to be made and local authorities should not transfer their responsibilities to the court as this would not be in accordance with either the spirit or intention of the 2000 Act.

3.30 The lack of emergency measures in the legislation to protect adults with incapacity, who may be in imminent danger of abuse or neglect has also been raised. Whilst it is possible to get an interim guardianship order this can take several days to be processed.

Local authorities and Health Boards have been using emergency provisions under the 1984 Act and may continue to do so under the 2003 Act. A range of both voluntary and statutory stakeholders have indicated that a more appropriate solution may be to use vulnerable adults legislation to provide additional protection.

3.31 Part of the research focused on the processes and outcomes in relation to consideration of an application for guardianship or for an intervention order – including welfare, financial and combined financial and welfare provisions. Those assessed fit into 3 categories of having global incapacity, partial incapacity and capacity. The middle group may present particular practice dilemmas for workers in that there will be some capacity about some things some of the time. This may pose questions about whether this group should be protected through the 2000 Act or through different legislative provisions.

Question 13: Is it preferable to make a different provision for the compulsory care of people with a learning disability outwith the 2003 Act?

Question 14: What would the implications of change be in practice?

3.32 The 1984 Act is currently used for people with a learning disability who have a mental illness and diagnosis can be difficult as some are initially described as challenging or aggressive. The 1984 Act and the 1995 Act are also used for people with learning disabilities who offend as an alternative to going to prison and there is anecdotal evidence in some areas that probation coupled with a specific treatment programme do work effectively to divert people from admission to hospital or prison. The involvement of the criminal justice system can only happen as a result of an offence having been committed. One of the aims of a strategy for dealing with people with a learning disability to avoid inappropriate criminalisation would be to provide them with the support they need before they might be accused of offending behaviour.

3.33 If the police charge someone with an offence a report will be set to the Procurator Fiscal who will decide whether the case should proceed to court. If it is identified that the person has a learning disability or other condition the court is likely to call for a social enquiry report from the local authority social work department and if necessary either a psychological or psychiatric assessment. Based on the information in the reports the court will decide which sentence is appropriate which may include a probation report. Interventions do not come as a standard part of a probation order and have to be tailored and resourced through Health Services or Community. The third group of people with learning disabilities who are subject to the 1984 Act are those who display serious problem behaviour, particularly aggression, sexually inappropriate behaviour and arson. Given this range of behaviours and disposals, and given that the definition of a vulnerable adult is someone who is at risk or unable to care for themselves, a clear boundary will need to be drawn about who should benefit from any additional measures and who should not.

3.34 There appears to be a link between challenging behaviour and offending behaviour. In the main, people with more severe learning disabilities are considered to have challenging behaviour when their behaviour is manifested in serious aggression towards themselves or others rather than offending behaviour where criminal procedures may be

applied.

3.35 The most common reasons for detaining people with a learning disability under the 1984 Act and the 1995 Act included:

- a co-existing mental illness (not always identified at the time of detention);
- as an alternative to a prison disposal in criminal cases;
- to manage problematic behaviour, particularly aggression, sexually inappropriate behaviour and arson.

Those with a learning disability appear to be detained longer than other patients.

3.36 Recent discussions with practitioners in the State Hospital indicate that while most people with a learning disability could be sustained in the community they often require longer periods of treatment and preparation for discharge which will not always lead to success given the complexity of their needs. An added factor is that the community facilities needed to house individuals with a learning disability may need to be developed before discharge is possible. There are also tensions to be considered and balanced in terms of how best to protect the individual's human rights. Some would require such a high level of support in the community to prevent inappropriate behaviour it is possible that such containment may lead to a more restricted quality of life than more secure settings could provide.

3.37 The treatment of offenders and alleged offenders with a learning disability requires particular consideration. One school of thought is that those with a learning disability now have the same rights and responsibilities as other citizens and on that basis should be subject to the same disposals as others when found guilty of certain offences. Diversion from the courts is said to be common place. Much will depend on the individual's capacity to appreciate the consequences of their actions. However, imprisonment may place people with a learning disability at risk because of conflicts with other prisoners, self-injurious behaviour and paranoia.

3.38 The prison environment may be questionable on humane grounds alone and also on it being an unlikely venue for addressing the specific needs of those with a learning disability with the consequent possibility of re-offending. Diversion from custodial options must be consistent, however, and evidence from Enable to the Millan Committee suggests that this is not always the case.

Scottish Executive Consultation on Vulnerable Adults 2002:

The questions

1. Do you agree with the SLC that a new legislative framework is required to protect vulnerable adults, beyond those with a mental disorder? If not, why not?
2. If you have answered yes to question 1, do you agree with the definition of vulnerable adult? **(NB this has been altered in the present consultation to take account of original responses)**
3. If you do not agree with the definition, what changes do you think require to be made of it?
4. What principles do you think should underpin any legislation extending the vulnerable adults provisions to persons without mental disorder?
5. Do you agree that the local authority should be entitled to demand admission, and if necessary, obtain a warrant for forcible entry, to premises where a vulnerable adults or suspected vulnerable adult is present, whether or not the adult objects?
6. Do you agree that there should be no examination, assessment or removal of an adult who objects and who has sufficient understanding of what is involved, unless those authorising or carrying out the intervention reasonably believe that the adult is vulnerable and is subject to undue pressure?
7. Do you agree that local authorities should be the responsible agencies under any provisions which are brought forward relating to non-mentally disordered vulnerable adults?
8. Do you agree that collaboration between local authorities and agencies such as NHSScotland and the Police is a matter best dealt with in a code of practice rather than legislation?
9. Which classes of officers of the local authority do you consider should be authorised under provisions relating to non-mentally disordered vulnerable adults?
10. In principle, do you agree with the SLC that the court should have the power to exclude a person living with a vulnerable adult, if necessary for the protection of the adult? If you answer no to this, please explain your key reservations.
11. Do you agree that the exclusion provisions would apply only where a vulnerable adult has entitlement to occupy the home? If not, please say in what circumstances they should apply.
12. Do you agree with the grounds of exclusion set out in paragraph 4.45 of the SLC's report?

13. Do you agree that an exclusion order should not be granted if the vulnerable adult objects, unless it is reasonable to believe that the objection is wholly or mainly a consequence of mental disorder and/or undue pressure?
14. Do you agree with the SLC that there should be a maximum 6 month time limit on an exclusion order?
15. Do you agree with the SLC that the excluded person who occupies by virtue of the adult's permission should not be re-entitled to occupy just because the period of the exclusion order has lapsed?
16. Do you agree with the SLC that there should be no statutory provisions preventing a person excluded under the vulnerable adults provisions from disposing of the home or bringing an action for the division and sale?
17. Do you agree with the SLC that, pending the making of an exclusion order, a sheriff should be able to make an interim exclusion order, provided the person who may be excluded has been given an opportunity to be heard?
18. Do you agree with the SLC that the sheriff, in granting an exclusion order should have power to grant an interdict against re-entry, a warrant for summary ejection and other appropriate orders (including attaching a power of arrest to any interdict and granting the interdict against re-entry subject to conditions)?
19. Do you agree that the sheriff should have the power to vary or recall any exclusion order, interim order or associated ancillary order?
20. Do you agree that where the vulnerable adult is able to apply for an exclusion order only he or she may do so?
21. Do you agree that if the vulnerable adult is not able to make an application, it may be made on the adult's behalf by an appointee under the Adults with Incapacity (Scotland) Act 2000 or by the local authority?
22. Do you agree that the local authority should have a duty to apply if satisfied that no-one else was doing so; no other proceedings for the removal of the abuser were pending or under consideration; and the grounds for exclusion were met?
23. Do you think that, before a local authority could take action under these provisions, where it was not an appointee under the 2000 Act, it should be necessary for a doctor to certify that the adult is incapable of making the application for the exclusion order?
24. Do you agree that the courts should be able to consider appointing a safeguarder to the vulnerable adult where the application is made on the adult's behalf?
25. Do you think that the courts should be able to consider appointing a safeguarder to a vulnerable adult in relation to any proceedings before the sheriff court under vulnerable adults provisions?

26. Do you agree that a person who is entitled to occupy a home which he or she shares with the vulnerable adult and any other person should be able to apply for that other person's exclusion on the same grounds as in paragraph 4.45 of the SLC's report?

27. Do you have any views on the resource implications of the legislation discussed in this paper?

Summary findings on the consultation on the establishment of a List of those disqualified for working with Vulnerable Adults

Introduction

The consultation paper *Protecting Vulnerable Adults – Securing their Safety: A pre-legislative consultation paper on the establishment of a List of adults unsuitable to work with vulnerable adults* was published in February 2004. It set out the Executive's intention to create a List of adults who were unsuitable to hold a position, either employed or voluntary, which involved caring for vulnerable adults because their conduct had caused harm or the threat of harm to such individuals. It also made it an offence for listed individuals to apply to work with vulnerable adults, and for care providers to employ listed individuals in a care position.

The consultation provided individuals and organisations with the opportunity to consider whether what was suggested was appropriate, and to give their view on whether the operational details that were outlined were realistic and achievable. It parallels similar measures that are being taken forward in the other countries of the UK e.g. the Protection of Vulnerable Adults measures that have recently come into force in England.

Eighty-eight responses were received to the consultation paper.

Key findings

- Respondents universally supported the proposal to establish the List of adults unsuitable to work with vulnerable adults.
- Further guidance and information would be required when the policy is fully formulated.
- The terms, definitions and responsibilities need to be given further consideration and should remain flexible to encompass newer provisions to ensure the best protection of vulnerable adults.
- Provisional Listing and its effects raised serious concerns, particularly in terms of ECHR.
- That the information on the List should be shared as widely as possible and strong links should be made with the Children's List.
- All staff should be checked indiscriminately to ensure no loopholes were available to be exploited.
- That more should be done to show that the List applies to volunteers as well as employees.

Questions and Responses

1. Are terms, definitions and responsibilities sufficiently clear? Are these too wide or too narrow - do we need to add to the list of care services for the newer types of care provision?

Sixty-eight respondents referred directly to the clarity of the terms definitions and responsibilities, sixty-six suggested amendments, generally the view was that they were too narrowly defined and restrictive. The most commonly requested changes are listed below:

- The definition of vulnerable adult requires further consideration. The definition used in the Adults with Incapacity (Scotland) Act 2000 or the Department of Health definition in *No Secrets*, or as used by Disclosure Scotland, or as set out in the Community Care and Health (Scotland) Act 2002 should be used. There were also concerns that the definition of vulnerable adult were too focussed on the care received and this would exclude some groups of vulnerable adult, such as people with a learning disability, who do not receive care services that could be placed at risk of harm if unsuitable persons worked in other types of services, for example, advocacy, counselling, speech and language therapy etc.
- A number of respondents also queried the decision to define a vulnerable adult as a person aged over 18 and were concerned that those between 16-18 could be exposed under this definition.
- A number of respondents suggested that a clearer definition of care provider is required and that any service registered under the Regulation of Care (Scotland) Act 2001 should be included and that the list of care services/providers should be flexible and regularly updated to ensure effective protection and allow newer types of provision to be added.
- Nine respondents were concerned about that the terms ‘misconduct’, ‘harm’, and ‘risk of harm’ could be misinterpreted. Most felt that types of harm should be defined further to include financial, physical, emotional and sexual harm and neglect.
- Almost all respondents who replied to this question queried the terms set for care workers. The main area of concern was that the definition was too narrow and that there are a number of individuals who would not be defined as care staff who may be in a one-on-one position with a vulnerable adult, such as cleaners, drivers, housing support staff etc. A small number indicated that it is crucial to ensure that the term care worker does not exclude care home managers.
- The definition of employment needs to be more balanced to cover both employed staff and volunteers.
- The prescribed services definition should be expanded to include day services, housing support, transport services.
- At least a third of the respondents to this question asked how vulnerable adults who employ personal assistants through Direct Payments would be protected and if they or their representative would have the authority to check the List..

2. What human rights issues do you anticipate being raised by individuals affected by these proposals, and how do you think these can best be addressed?

Fifty-two of the respondents covered this question in their response. There were a number of concerns about the protection of the human rights of the care worker and the presumption of innocence until investigations are concluded. The main ECHR Articles that were raised were Article 6 (right to a fair hearing); Article 8 (privacy) and Article 14 (freedom from discrimination). Twelve respondents had serious concerns over the provisional listing prior to the conclusion of disciplinary procedures as an infringement of the human rights of the care worker. The ‘would have dismissed’ and ‘would have considered dismissal’ categories (see question 7). also created uneasiness.

However, thirteen felt that providing the processes were open and transparent and the employee/volunteer had a fair hearing and right to appeal against the decision made by Scottish Ministers then the process was workable and that the balance of the list should be weighted towards protecting the vulnerable adult.

3. What specific human rights issues do you anticipate may emerge about the sharing of information across both children and adult lists, and how could these be resolved?

Many felt that sharing information afforded better protection to vulnerable adults and to children.

Twenty-nine respondents replied to this question. Almost all believed that information should be shared but acknowledged that there were human rights issues related to this. The exact breakdown is given below:

One List (for children and vulnerable adults)	8
Two Lists (shared/cross-referenced)	11
Two separate lists (not sharing information)	3
Two lists (shared under certain circumstances)	4
Unsure	3

Other concerns are that this would be in breach of the Data Protection Act and that confidentiality and accuracy of information may be compromised.

4. Do you think it is appropriate to ensure the sharing of listed individuals to prevent potential abusers avoiding detection by moving between countries?

Fifty-one responses were made to this question. The breakdown was as follows:

Share information as widely as possible	38
Do not share information	2
Share information with some considerations	9
Unsure	2

In addition to the same concerns raised in response to question 3, whilst acknowledging that this would require significant extra work, some felt that sharing should be as wide as possible - across the UK, European Union and, if possible, under reciprocal arrangements

5. Should the referral process be strengthened or amended in any way? Do you foresee any difficulties in the process at the point where disciplinary procedures are exhausted and referral to the List begins?

Of the forty-one replies to this question many suggested some amendment to the referral process. Nine felt that the process should have more detailed guidance to make it more workable and clear. Six respondents believed that inclusion on the List should only take place after the employer's investigation was complete. A number felt that other professional bodies and groups should be able to refer to the List, such as the Mental Welfare Commission, SSSC, the police and procurator fiscal service, the Care Commission, Health Professionals Council and the Nursing and Midwifery Council. There was a small number who thought that provisional listing could lead to litigation if the provisionally listed individual was subsequently found innocent of any wrong doing. Others thought that greater weight should be given to criminal offences/charges/convictions and less on employee-based evidence and A balance would also need to be struck between face-to-face hearings with those who are alleged to be unsuitable and reliance on documentary evidence.

6. Are the distinctions between current and former employees the right ones to draw?

Forty-seven responses, broken down as follows:

Right distinctions	25
Wrong distinctions	4
Requires more clarification	6
Unsure	9

Whilst the majority think that the right distinctions are drawn, guidance and clarification will be needed about the referral of a worker who left employment prior to the List commencing. Retrospective referral, particularly of former employees, is regarded as untenable by some because of restrictions placed on employers in respect of data protection and because of the possibility of malicious referrals where working relationships have broken down.

7. Are the 'would have dismissed' and 'would have considered dismissal' categories appropriate?

There were fifty responses, broken down as follows:

Appropriate categories	23
Wrong categories	13
Needs clarification	10

The 'would have considered dismissal' category was considered to be a potential breach of human rights that could result in litigation against the employer. Some thought that it was an insufficient conclusion to warrant inclusion on the List and was open to interpretation and bias by employers and may be in breach of current employment law.

The majority thought that the categories would work if clear guidance was issued by using examples to establish principles and distinctions.

8. Should any discretion be built in to the checks for groups of staff, or students, who move frequently from one employer to another? If so, what would this consist of, and what groups would be included?

There were forty-nine responses as follows:

No discretion	41
Needs clarification	5
Unsure	3

The overwhelming view was that no group should be totally excluded from the checks, although frequent checks would be expensive and time consuming. It was suggested that:

- education establishments should be responsible for checking students when they commence their studies;
- Agency staff should be checked by their agency every 12 months;
- Employees who move very regularly, such as junior doctors, be issued with written confirmation that they were not on the List.

9. From your experience, what would be the risks to vulnerable adults in having such discretion? How could these known risks be reduced?

Of seventeen responses to this point all were strong in the belief that discretion would result in loopholes that would result in vulnerable adults potentially being exposed to unsuitable individuals. It was suggested that such discretion would undermine the credibility of the List.

10. Are repeat checks necessary for long-term staff? If so, how frequently should these be conducted?

Forty-two respondents commented on this question. The breakdown of responses is shown below:

Repeat checks not necessary	4
Repeat checks necessary	31
Repeat checks for staff with more than one employer/position/agency	3
When staff change role only	2
When there are grounds for suspicion	1
Unsure	1

The suggested frequency of repeat checks on permanent staff varied and the most commonly suggested were:

Every 3 years in line with re-registration processes	12
--	----

Every year	5
Between 2 and 5 years (excluding 3 yearly)	4
Every 10 years	2

There was general support for the checking of long term staff to be carried out to coincide with the re-registration of staff with professional bodies or the re-registration of the care provider by the Care Commission.

11. Would there be difficulties for employers in operating the protection of children measures and the protection of vulnerable adult measures if there were variations between the schemes? If so, what would those difficulties be?

There were thirty-eight responses to this point. The overriding belief was for one list or that the two lists should be the same and operate in the same way to avoid conflict or duplication of work. The full breakdown is as follows:

The Lists should operate in the same way	16
There should be one List	11
Cross-referencing should be considered	5
N/A; no comment; unsure	3
Two separate Lists	2
Difficult to justify sharing information	1

12. What are your views on the proposed implications of being on the List? Are there any alterations that you consider necessary?

Many respondents reiterated previous concerns. Some requesting more information on the legal advice and support that might be available to employers/employees, that a provisionally listed individual who was found innocent may be in a position to sue the employer for defamation, and that a more thorough independent hearing process would be required to ensure that requirements under ECHR were met.

Queries were raised over the offences, such as the apparent contradiction between the offence for employers to employ listed persons and that it is not an offence for a person to apply for a position if they are listed. It was also noted that the process of provisional listing would be stressful.

13. Should a time limit for provisional listing be specified, and what should this limit be?

There were thirty-nine responses to this question. The main breakdown of suggested time limits is as follows:

Up to 3 months	16
3-6 months	8
6-12 months	5
Support a short time limit (actual time limit not specified)	8

There was clear support for any provisional listings to be restricted to a short time given the implications and for a provisionally listed individual to be given the right of appeal at any time during the process. The need to be flexible was recognised, however, particularly where police investigations and formal investigations are required.

14. Are the proposed Appeals procedures logical e.g. are the timeframes for review of inclusion realistic ones?

There was overall support for the appeals process and for these to be dealt with quickly. Some were concerned that 10 years was too long before the review of an individual's listing. Others thought that individuals would find the cost of the procedures restrictive unless legal aid was available.

15. What do you anticipate the additional costs of implementation to be for your area?

Thirty-five organisations responded to this question but were unable to give detailed costings. Voluntary sector providers asked that any additional costs to them be met by local or central government. Others thought that any delays in disclosure checks because of increased volume would delay staff start times and that this would be costly in terms of quality of care caused by subsequent staff shortage.

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Who is covered by the 2000 Act?

1. The Adults with Incapacity (Scotland) Act 2000⁹, which is almost entirely in force now, covers adults¹⁰ with incapacity. An adult is “incapable” if incapable of acting or making decisions or communicating decisions or understanding decisions or retaining the memory of decisions, by reason of mental disorder or of inability to communicate because of physical disability¹¹. A “mental disorder” means mental illness (including personality disorder) or mental handicap however caused or manifested; but an adult is not to be treated as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy, dependence on alcohol or drugs, or acting as no prudent person would act¹². This coincides with the definition of “mental disorder” in section 1(2) of the Mental Health (Scotland) Act 1984¹³, and will be replaced by the definition of “mental disorder” in the Mental Health (Care and Treatment) (Scotland) Act 2003: paragraph 9(5) of Schedule 4 to the 2003 Act. The definition in the 2003 Act, although not directly referring to the learning disabled, will cover those with a learning disability. Under the 2000 Act, people are not to be classed as incapable in any general sense; they will be assessed as being incapable for particular purposes. This was a fundamental change in the previous law under which one was either capable or incapable and nothing in between. This meant that the old law could deprive people of legal capacity for acts and transactions for which they would otherwise be capable and often discouraged exercise and development of skills.¹⁴

⁹ 2000 asp 4.

¹⁰ An adult means a person who is 16 years or over: section 1(6) of the 2000 Act. This ties in with the definition of a child in the Age of Legal Capacity (Scotland) Act 1991 (c.50).

¹¹ Section 1(6) of the 2000 Act. A person is not, however, incapable by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise): section 1(6) of the 2000 Act.

¹² Section 87(1) of the 2000 Act.

¹³ Section 1(2) of the Mental Health (Scotland) Act 1984 (c.36) defines “mental disorder” as mental illness (including personality disorder) or mental handicap however caused or manifested.

¹⁴ See section 1(5) of the 2000 Act.

General principles

1. Section 1 of the 2000 Act provides some overriding general principles to be applied when considering any intervention in relation to an incapable adult. For there to be any kind of intervention in the affairs of an adult not only must there be incapacity but there must also be a need for that particular intervention; the need must not be able to be met without intervention; only the minimum necessary intervention must be used; and the least restrictive option in relation to the freedom of the adult must be selected. The general principles operate at 3 levels: choice of procedure; where the chosen procedure offers such flexibility, the choice of powers conferred; and the decisions and actions, on an ongoing basis, of appointees and others authorised to act. The principles must be taken into account not only when a choice of intervention is first taken, but whenever anyone empowered to put in place any of the interventions does so.¹⁵

Safeguards

2. A safeguarder can be appointed to safeguard the interests of a person who is the subject of any application or proceedings under the 2000 Act. The safeguarder will among other things convey the views of the adult, so far as they are ascertainable, to the Court unless the Court considers that it would be inappropriate for the safeguarder to do so, in which case another person will be appointed to convey the adult's views to the Court¹⁶.

Public Guardian

3. The Accountant of Court is appointed as the Public Guardian. The Public Guardian will supervise guardians¹⁷ and other people authorised under intervention orders¹⁸ to exercise functions relating to the property or financial affairs of the adult concerned and will establish registers for documents relating to continuing powers of attorney¹⁹, welfare powers of

¹⁵ See section 1(1) to (4) of the 2000 Act. The 2000 Act provides that there shall be no intervention in the affairs of an adult unless the person responsible for authorising or affecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot be achieved without intervention. Any such intervention must be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

¹⁶ Sections 3(4) and (5) and 5 of the 2000 Act.

¹⁷ See paragraph 38.

¹⁸ See paragraph 35.

¹⁹ See paragraph 10.

attorney²⁰, authorisations to intromit with funds, documents relating to guardianship orders and documents relating to intervention orders. The Public Guardian will also receive and investigate complaints about the exercise of functions relating to an adult's property or financial affairs by continuing attorneys, withdrawers²¹, guardians or persons authorised under intervention orders²². The Public Guardian must also investigate any circumstances made known to him in which an adult's property or financial affairs seem to him to be at risk. The Public Guardian will also provide information and advice about the performance of functions relating to property or financial affairs under the 2000 Act to guardians, continuing attorneys, withdrawers and people authorised under an intervention order.

Mental Welfare Commission

4. The Mental Welfare Commission²³ is also given general functions in relation to adults who are not incapable only because of an inability to communicate²⁴.

²⁰ See paragraph 11.

²¹ See paragraph 19.

²² See sections 6-7 of the 2000 Act.

²³ Whose establishment is continued under section 2 of the Mental Health (Scotland) Act 1984 and will similarly be continued under section 4(1) of the 2003 Act.

²⁴ If their functions relate to people who are incapable by reason of, or by reasons which include, mental disorder: section 9(1) of the 2000 Act.

Local authorities

5. Local authorities are also given functions in relation to the personal welfare of an adult²⁵. A local authority must supervise guardians with functions relating to the personal welfare of the adult, and receive and investigate complaints regarding the exercise of functions relating to personal welfare of an adult by welfare attorneys, guardians and people authorised under intervention orders. Local authorities must also investigate any circumstances made known to them in which the personal welfare of an adult seems to them to be at risk. Local authorities have duties to apply for intervention orders²⁶ and guardianship orders²⁷ which relate to the protection of the property or financial affairs of the adult as well as personal welfare. In any case where there is a significant dispute between the local authority and a guardian as to whether the guardian is acting inappropriately or properly but in a manner inconvenient to the local authority, the matter can be referred to the Mental Welfare Commission under section 9 of the 2000 Act or to the sheriff for direction under section 3 of the 2000 Act.

Obligation to safeguard adults affairs and welfare

6. Where the Public Guardian, Mental Welfare Commission or the local authority have carried out an investigation they can take such steps, including the making of an application to the Sheriff, as seem to them to be necessary to safeguard the property or financial affairs or the personal welfare of the adult²⁸.

Codes of Practice

7. The Scottish Ministers must publish various Codes of Practice containing guidance on the exercise of functions under the 2000 Act for local authorities, continuing and welfare attorneys, persons authorised under intervention orders, guardians, withdrawers, managers of authorised establishments, supervisory bodies and persons authorised to carry out medical

²⁵ See section 10 of the 2000 Act.

²⁶ Section 53(3) of the 2000 Act.

²⁷ See section 57(2) of the 2000 Act.

²⁸ See section 12 of the 2000 Act.

treatment or research under the 2000 Act, and on such other matters arising out of or in connection with the 2000 Act as the Scottish Ministers consider appropriate²⁹.

Right to appeal decisions as to incapacity of an adult

8. If a decision is taken for the purposes of the 2000 Act, (other than by the sheriff,) as to the incapacity of an adult, it may be appealed to the sheriff by the adult or any person claiming interest in the adult's property, financial affairs or personal welfare relating to the purpose for which the decision was taken. If the decision is taken by the sheriff it can be appealed to the Sheriff Principal and from there, with the leave of the Sheriff Principal, to the Court of Session.³⁰

Attorneys

9. There are 2 types of power of attorney under the 2000 Act: continuing powers of attorney and welfare powers of attorney. A continuing power of attorney relates to property or financial affairs. It states that it is the granter's intention that the power continues even if he is incapable in relation to decisions about the matter to which the power of attorney relates. The continuing power shall continue in such circumstances provided that it is subscribed by the granter, incorporates a statement which clearly expresses the granter's intention that the power be a continuing one and incorporates a certificate in a prescribed form (by a solicitor or a member of another prescribed class) that (a) the person has interviewed the granter immediately before the granter subscribed the document, (b) states the person is satisfied either because of his own knowledge of the granter or because he has consulted other people (who must be named in a certificate) who have knowledge of the granter certify that when the continuing power of attorney was granted the granter understood its nature and extent and (c) that he had no reason to believe that the granter was acting under undue influence or that any other factor vitiated the granting of the power³¹.

10. The welfare power of attorney relates to the granter's personal welfare. It can only be granted in favour of an individual and will only be valid if it is subscribed by the granter,

²⁹ Section 13 of the 2000 Act.

³⁰ See section 14 of the 2000 Act. A person claiming an interest includes the local authority, the Mental Welfare Commission and the Public Guardian: section 87(1) of the 2000 Act.

³¹ See section 15 of the 2000 Act.

incorporates a statement which clearly expresses the granter's intention that the power be a welfare power to which section 16 of the 2000 Act applies, and incorporates a certificate giving the same information as the certificate required for a continuing power of attorney³². A welfare power of attorney shall not be exercisable unless the granter is incapable in relation to the decisions about the matter to which the power of attorney relates or the welfare attorney has reason to believe that this is the case³³. The welfare attorney must not put the granter in a hospital for the treatment of a mental disorder against his will or must not consent on behalf of the granter to any form of treatment to which Part X (consent to treatment) of the 1984 Act applies or to specific medical treatment prescribed by the Scottish Ministers in Regulations³⁴. The 2003 Act will amend this so that the welfare attorney is subject to the provisions of Part 16 (medical treatment) of the 2003 Act: Schedule 4, paragraph 9(3) and Schedule 5. A welfare power of attorney will not end on the bankruptcy of the granter or the welfare attorney.³⁵ These provisions about welfare powers of attorney also apply to equivalent appointments under other jurisdictions, if recognised by Scots law.³⁶

11. A power of attorney granted after the commencement of the 2000 Act which is not granted in accordance with section 15 or 16 of the 2000 Act (summarised in paragraphs 10 and 11 above) shall have no effect during any period when the granter is incapable in relation to decisions about the matter to which the power of attorney relates.³⁷

12. Attorneys have common law duties but these do not include a specific duty to act and the 2000 Act does not impose such a statutory duty to act. However, the 2000 Act does expressly permit an attorney not to act where doing so would be unduly burdensome or expensive in relation to the value or utility of the act.³⁸

13. A continuing or welfare attorney shall have no authority to act until the document conferring the power of attorney has been registered with the Public Guardian. This includes the continuing attorney's authority to act before the adult becomes incapable.³⁹ The Public

³² Sections 16(1) to (3) of the 2000 Act.

³³ Section 16(5) of the 2000 Act.

³⁴ Section 16(6) of the 2000 Act.

³⁵ Section 16(7) of the 2000 Act.

³⁶ Section 16(8) of the 2000 Act.

³⁷ Section 18 of the 2000 Act.

³⁸ Section 17 of the 2000 Act.

³⁹ See section 19(1) of the 2000 Act.

Guardian shall only register a continuing or welfare power of attorney if he is satisfied that the attorney has agreed to act. Also, a continuing or welfare power of attorney can contain a condition that the Public Guardian shall not register it until the occurrence of a specified event and in that case the Public Guardian must not register it until he is satisfied that the specified event has occurred⁴⁰. Continuing and welfare attorneys must also keep records of the exercise of their powers⁴¹.

14. On an application from any person claiming an interest in the property, financial affairs or personal welfare of the granter of a continuing or welfare power of attorney, the sheriff can make various orders regarding supervision of the attorney and requiring accounts and reports from the attorney. The sheriff can also revoke the appointment of the attorney or any of the powers granted by the continuing or welfare power of attorney. These powers of the sheriff also extend to equivalent powers of continuing and welfare attorneys granted under other jurisdictions which are recognised by Scots law⁴².

15. Once a power of attorney has been registered with the Public Guardian, the attorney must notify the Public Guardian of any change of his address or that of the granter of the power of attorney, the death of the granter or of any other event which results in the termination of the power of attorney. The Public Guardian is then required to notify the granter of these changes, except where the Public Guardian considers that it would pose a serious risk to the granter's health⁴³. The Public Guardian also keeps the local authority and Mental Welfare Commission notified in relation to welfare powers of attorney although the Mental Welfare Commission is only notified if the incapacity of the granter is by reason of, or reasons which include, mental disorder⁴⁴.

16. A continuing or welfare attorney who wishes to resign after the document confirming the power of attorney has been registered with the Public Guardian⁴⁵ must notify the granter, the Public Guardian and any guardian (or where there is no guardian, the granter's primary

⁴⁰ See section 19(3) of the 2000 Act.

⁴¹ Section 21 of the 2000 Act.

⁴² See section 20 of the 2000 Act.

⁴³ See section 11(2) of the 2000 Act.

⁴⁴ See section 22 of the 2000 Act.

⁴⁵ The Public Guardian will only register powers of attorney if he is satisfied that the attorney wishes to act: see section 19(2) of the 2000 Act.

carer) and the local authority when they are supervising the welfare attorney⁴⁶. The resignation takes effect on the expiry of 21 days after receipt by the Public Guardian of such notice⁴⁷. If a joint attorney or an attorney in respect of whom the granter has appointed a substitute attorney is resigning, the resignation will take effect on receipt of the notice by the Public Guardian only if it is accompanied by evidence that the remaining joint attorney is willing to continue to act or the substitute attorney is willing to act⁴⁸.

17. If the attorney is worried that his resignation may pose a serious risk to the granter's health, he could apply to the sheriff to have himself removed, in which case the obligation to notify the granter will be placed on the Public Guardian who can dispense with notice to the adult if he thinks it poses a serious risk to the granter's health⁴⁹. When the granter and the attorney are married, the power of attorney is terminated by judicial separation, divorce or a declaratory of nullity, unless the power of attorney specifies otherwise⁵⁰. In relation to particular matters, attorneys are superseded by guardians with relevant powers⁵¹. The authority of a continuing or welfare attorney will also end in relation to any matter on the appointment of a guardian with powers relating to that matter⁵². Those acting in good faith in ignorance of the termination of a power of attorney terminated by the end of the marriage or supersession by a guardian are protected from any liability so incurred⁵³.

Accounts and Funds

18. Unless there is a guardian or continuing attorney with powers relating to the funds or accounts in question, or an intervention order has been granted relating to the funds or accounts in question⁵⁴, an individual can apply to the Public Guardian for authority to intromit with funds held on behalf of an adult who is (a) incapable in relation to decisions about the funds or of safeguarding his interests in the funds and (b) the sole holder of an

⁴⁶ Section 23(1) of the 2000 Act.

⁴⁷ Section 23(2) of the 2000 Act.

⁴⁸ Section 23(4) of the 2000 Act.

⁴⁹ See section 11(2) of the 2000 Act.

⁵⁰ Section 24(1) of the 2000 Act.

⁵¹ Section 24(2) of the 2000 Act.

⁵² Section 24(2) of the 2000 Act.

⁵³ Section 24(4) of the 2000 Act.

⁵⁴ Section 34 of the 2000 Act and section 31(7) of the 2000 Act. A guardian and a continuing attorney include guardians and continuing attorneys appointed in another jurisdiction which is recognised by Scots law.

account in his name⁵⁵. Where such authority is granted, the person with authority to intromit with the funds is called a “withdrawer”⁵⁶. The details of the authority to intromit together with the withdrawer’s details are included in the register held by the Public Guardian⁵⁷. The withdrawer may then use the adult’s funds to pay the adult’s taxes, to: provide food, accommodation, fuel, clothing, related goods and services for the adult, to provide other services for the purposes of looking after or caring for the adult and to settle any debts owed by or incurred in respect of the adult⁵⁸. The Public Guardian may authorise payment for the provision of other items⁵⁹. Any funds used by the withdrawer are to be applied only for the benefit of the adult and therefore the withdrawer may not be able to use any funds for small gifts to family members⁶⁰.

19. The withdrawer can require the fund holder of the adult’s account to transfer to a designated account such sums as the Public Guardian authorises⁶¹. A fund holder of an account held by an adult is liable to the adult for any funds taken from the account in such a way when the fund holder was aware that the withdrawer’s authority had been terminated or suspended by the Public Guardian; but on meeting such liability, the fund holder of the account will have a right of relief against the withdrawer⁶². Withdrawers may be required to keep records of their intromissions with the funds⁶³.

20. Authority to intromit will normally be valid for 3 years but this period may be extended or reduced by the Public Guardian⁶⁴. If the Public Guardian decides to terminate the authority of a withdrawer, the Public Guardian may grant the withdrawer interim

⁵⁵ Section 25 of the 2000 Act. The method of determining an application for such authority is set out in section 26 of the 2000 Act.

⁵⁶ Section 26(10) of the 2000 Act.

⁵⁷ Sections 26 and 27 of the 2000 Act.

⁵⁸ Section 28(1) of the 2000 Act.

⁵⁹ Section 28(2) of the 2000 Act.

⁶⁰ Section 28(3) of the 2000 Act.

⁶¹ Section 29(1) of the 2000 Act.

⁶² Section 29(2) of the 2000 Act.

⁶³ Section 30(1) provides that Scottish Ministers may make Regulations regarding such records. Section 30(2) and (3) of the 2000 Act provide that the Public Guardian may make enquiries about how the withdrawer is exercising his functions and ask the withdrawer to produce any records he has relating to his intromissions and may require the fundholder of an account in the name of an adult or of a designated account to make its records of the account available for inspection by the Public Guardian. The Public Guardian also has powers under section 6(2)(c)(ii) to receive and investigate complaints concerning intromissions, general powers to investigate under section 6(2)(d) and further powers under section 12. The sheriff has powers to give directions under section 3(3) of the 2000 Act.

⁶⁴ Section 31(1) and (2) of the 2000 Act.

authority to continue to intromit with the funds for a period not exceeding 4 weeks⁶⁵. Reduction or extension of a period of validity and suspension or termination of authority of the withdrawer may be appealed to the sheriff⁶⁶. A withdrawer's authority comes to an end upon either the appointment of a guardian with powers relating to the funds or account in question; on the granting of an intervention order relating to the funds or account in question; or on a continuing attorney's acquiring authority to act in relation to the funds or account in question⁶⁷.

21. Where an individual is a joint account holder and becomes incapable in relation to decisions about or of safeguarding his interests in the funds in the account, any other joint account holder may continue to operate the account unless the terms of the account provide otherwise or he is barred by an order of the court from doing so. However, this provision does not apply where there is a guardian or continuing attorney with powers relating to the funds or account in question or an intervention order has been granted relating to the funds or account in question⁶⁸. The Public Guardian may authorise transfers between specified accounts of an adult, where there is more than one. Decisions by the Public Guardian may be appealed by a sheriff whose decision is final⁶⁹.

⁶⁵ Section 31(4) of the 2000 Act.

⁶⁶ Section 31(6) of the 2000 Act.

⁶⁷ Section 31(7) of the 2000 Act and the guardian and continuing attorney includes a reference to a guardian or continuing attorney appointed under another jurisdiction which is recognised by Scots law: section 31(8) of the 2000 Act.

⁶⁸ Sections 32 and 34 of the 2000 Act.

⁶⁹ Section 33 of the 2000 Act.

Management of Resident's Finances

22. Where an adult is a resident⁷⁰ of an authorised establishment⁷¹, who has been found by a medical practitioner to be incapable in relation to decisions as to, or of safeguarding his interest in, any of the matters which may be managed for him by the managers of the establishment⁷², if the managers of that establishment have considered all other appropriate courses of action and have decided that management on behalf of the resident of the resident's affairs is the most appropriate course of action, then unless and until there is a guardian, continuing attorney or other person with powers relating to that matter, or an intervention order has been granted relating to that matter⁷³, the managers of the establishment shall be entitled to manage the resident's affairs on behalf of the resident⁷⁴. The medical practitioner's certificate, upon which the manager's powers are based, shall be reviewed if there is any change in the resident's condition or circumstances bearing on the resident's incapacity and, in any event, 3 years after it is issued⁷⁵. The managers may not without the consent of their supervisory body⁷⁶ manage any matter which has a value greater than a prescribed amount, unless the supervisory body permits them to do so⁷⁷.

23. The managers must comply with the general principles in section 1 of the 2000 Act and, when considering all other appropriate courses of action, the option of no intervention must always be considered, having regard to section 1(2) of the 2000 Act. A decision taken

⁷⁰ A resident means an adult whose residence is for the time being an authorised establishment (see footnote 72 below) or who is liable to be detained there under the 1984 Act: section 35(5) of the 2000 Act.

⁷¹ An authorised establishment means a hospital (whether an NHS hospital, an independent hospital, a private psychiatric hospital or a State hospital), or a care home service or a limited registration service. In the latter 2 cases they will only be regarded as authorised establishments if neither the person who has applied to have the care home service or limited registration service registered under the Regulation of Care (Scotland) Act 2001 (asp 8) or the managers of the establishment have not given notice that they do not wish to have the power to manage residents' finances: section 35(1) and (3) of the 2000 Act. (Moreover, psychiatric hospitals are about to be removed from this list: Schedule 5 of the 2003 Act.)

⁷² These matters are listed in section 39(1) of the 2000 Act. They include matters relating to pensions, benefits, allowances and other payments which are not payments under the Social Security Contributions and Benefits Act 1992 (c.4); matters relating to money to which the resident is entitled; the holding of other movable property to which the resident is entitled; and the disposing of such movable property - the "resident's affairs."

⁷³ Section 46(1) of the 2000 Act. The guardian and continuing attorney include guardians and continuing attorneys appointed under the law of any country where the guardianship is recognised by the law of Scotland – section 46(2) of the 2000 Act.

⁷⁴ Section 37(1) and (2) of the 2000 Act.

⁷⁵ Section 37(1) and (7) of the 2000 Act.

⁷⁶ The supervisory body is the Scottish Commission for the Regulation of Care in relation to establishments registered under the Regulation of Care (Scotland) Act 2001 and the Health Board for the area in which the establishment is situated for the other establishments: section 48(1) of the 2000 Act.

⁷⁷ Section 39(3) and (4) of the 2000 Act.

as to the incapacity of an adult may be appealed to the sheriff⁷⁸ by the adult or any person claiming an interest in the adult's property, financial affairs or personal welfare relating to the purpose for which the decision was taken. The managers have a duty to encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare and to develop new skills in this area, so far as it is reasonable and practicable to do so⁷⁹.

24. The supervisory bodies⁸⁰ have a duty to make enquiries into how managers of establishments are managing residents' affairs and shall investigate any complaint received about this⁸¹.

25. Managers of establishments who are managing residents' affairs must comply with any requirements of their supervisory body relating to keeping residents' funds separate or distinguishable from each other (and from the funds of the establishment), and must make sure that they do not hold more than a prescribed amount of funds for any resident. They must keep records of all transactions in respect of each resident, produce records when requested to do so by the resident, his nearest relative or the supervisory body, and spend money only on items or services which benefit the resident on whose behalf the funds are held, and not on items or services which are provided by the establishment to or for such a resident as part of its normal service. They are further obliged to make proper provision to indemnify residents against any loss attributable to their acts or omissions including any breach of duty, misuse of funds, and failure to act reasonably on the part of the managers⁸². They must also encourage the adult to exercise existing skills and develop new skills, insofar as it is reasonable and practicable to do so⁸³. The managers of an authorised establishment can select one or more people, who are managers or officers or members of staff of the establishment, to have the authority to withdraw money from a resident's account. The supervisory body issues the certificate giving these people the power and can revoke it at any time⁸⁴. There is no requirement to intimate this authority to the resident or any other person, including the Public Guardian, but the general principles will apply, including the

⁷⁸ Section 14 of the 2000 Act.

⁷⁹ Section 1(5) of the 2000 Act.

⁸⁰ Section 40(1) of the 2000 Act: see paragraph 23 above.

⁸¹ Section 40(2) and (3) of the Act.

⁸² Section 41 of the 2000 Act.

⁸³ Section 1(5) of the 2000 Act.

⁸⁴ Section 42 of the 2000 Act.

requirement to take account of the present and past wishes of the resident, if ascertainable, and the views of others⁸⁵.

26. If a resident either becomes capable of managing his/her affairs or moves out of the establishment, then the managers of the establishment prepare a statement of the affairs of the resident as at that date. The statement is given to the resident and, where appropriate, to the next establishment he moves to, or to the person who will manage his affairs in the future. The managers of the old establishment are entitled, for up to 3 months from the date on which the resident either becomes capable or ceases to be a resident, to manage the resident's affairs while such other arrangements as are necessary for managing his affairs are being made (including by himself)⁸⁶.

27. If a supervisory body decides that the managers of an establishment should no longer continue to manage a resident's affairs, it may revoke that power to manage. If so, the supervisory body must take over management of the resident's affairs within 14 days and comply with the usual requirements imposed on managers of an establishment. Within 3 months the supervisory body must arrange for the management of a resident's affairs to be transferred to some other establishment, authority or person (who may be the resident) as they consider appropriate⁸⁷. A revocation may be annulled⁸⁸. Any decision of the supervisory body can be appealed to the sheriff, whose decision is final⁸⁹.

Medical Treatment⁹⁰ and Research

28. If the medical practitioner primarily responsible for the medical treatment of an adult⁹¹ thinks that the adult is incapable in relation to a decision about the medical treatment

⁸⁵ Section 1(4) of the 2000 Act.

⁸⁶ Sections 43 and 44 of the 2000 Act.

⁸⁷ Section 45(1) to (4) of the 2000 Act.

⁸⁸ Section 45(5) of the 2000 Act.

⁸⁹ Section 45(6) of the 2000 Act.

⁹⁰ Medical treatment includes any procedure or treatment design to safeguard or promote physical or mental health: section 47(4) of the 2000 Act.

⁹¹ The Smoking Bill is about to amend section 47 of the 2000 Act to include dentists, ophthalmic opticians, registered nurses and other people prescribed by the Scottish Ministers (provided in all cases that they satisfy any requirements prescribed by the Scottish Ministers) who are primarily responsible for the medical treatment of the kind in question (ie a dentist can authorise dental treatment but not other treatment).

in question⁹², the medical practitioner shall, during the period specified in the medical treatment certificate⁹³, have authority to do what is reasonable in the circumstances in relation to the adult's medical treatment, to safeguard or promote the physical or mental health of the adult⁹⁴. He can also authorise medical treatment by others acting on his behalf under his instructions or with his approval or agreement⁹⁵. A certificate can be revoked. A certificate can only be issued for a period not exceeding one year⁹⁶, and there is no provision that a certificate cannot be renewed⁹⁷.

29. The certificate will not authorise (a) the use of force or detention, unless it is immediately necessary and only for so long as it is necessary in the circumstances; (b) any action which would be inconsistent with any decision by a competent court; or (c) the placing of the adult in a hospital for the treatment of mental disorder against his will⁹⁸. Moreover, the certificate will not authorise any forms of treatment to which Part X of the 1984 Act applies⁹⁹. Also the Scottish Ministers can specify other medical treatment which will not be authorised by the certificate¹⁰⁰. Where any medical treatment is the subject of proceedings in a court, and these proceedings have not been determined, the only medical treatment authorised by the certificate will be that authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition¹⁰¹. However, even such medical treatment will not be permitted during court proceedings where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment¹⁰².

30. A certificate will not give any authority in relation to medical treatment if, to the knowledge of the medical practitioner primarily responsible for the medical treatment of the adult, an application for an intervention order or guardianship order with power in relation to

⁹² And has certified that he is of this opinion: section 47(1)(b) and (5) of the 2000 Act. A certificate can last for any period which the medical practitioner thinks appropriate but must not exceed one year.

⁹³ Which shall be for up to one year: section 47(5) of the 2000 Act.

⁹⁴ Section 47(2) of the 2000 Act.

⁹⁵ Section 47(3) of the 2000 Act.

⁹⁶ The Smoking Bill is about to amend section 47 of the 2000 Act so that, in certain circumstances to be prescribed by the Scottish Ministers, a certificate can last for up to 3 years.

⁹⁷ Section 47(6) of the 2000 Act.

⁹⁸ Section 47(7) of the 2000 Act.

⁹⁹ Sections 47(8) and 48(1) of the 2000 Act. The 2003 Act will remove the reference to Part X of the 1984 Act: (Schedule 5 to the 2003 Act) and provide that the medical practitioner is subject to Part 16 of the 2003 Act (medical treatment): Schedule 4, paragraph 9(3) of the 2003 Act.

¹⁰⁰ Sections 47(8) and 48(2) of the 2000 Act.

¹⁰¹ Section 47(9) of the 2000 Act.

¹⁰² Section 47(10) of the 2000 Act.

any medical treatment referred to in the certificate has been made to the sheriff and has not been determined. Until then the only medical treatment authorised by such a certificate will be that authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition, subject to any interdict granted or continuing to have effect¹⁰³.

31. If a guardian or welfare attorney has been appointed or a person has been authorised under an intervention order with power in relation to any medical treatment, a certificate will not authorise the medical practitioner to carry out any medical treatment if (a) he is aware of the appointment or authorisation and (b) it would be reasonable and practicable for him to obtain the consent of the guardian, welfare attorney or person authorised under the intervention order to the proposed medical treatment but he has failed to do so¹⁰⁴. If the guardian, welfare attorney or authorised person is consulted and there is no disagreement as to medical treatment of the adult, any person having an interest in the personal welfare of the adult may appeal the decision as to the medical treatment to the Court of Session¹⁰⁵. If there is disagreement then the medical practitioner will ask the Mental Welfare Commission to nominate a medical practitioner to give an opinion as to the treatment proposed. If the nominated practitioner agrees with the medical practitioner, then the treatment will be given. If the nominated practitioner agrees with the guardian, welfare attorney or person authorised under the intervention order, then the medical practitioner or any person having an interest in the personal welfare of the adult may apply to the Court of Session for a determination as to whether the proposed treatment should be given or not¹⁰⁶. While an appeal is made to the Court of Session, no medical treatment is authorised unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition, subject to any interdicts granted and continuing to have effect¹⁰⁷. A guardian and a welfare attorney include references to those appointed under other jurisdictions who are recognised under Scots law¹⁰⁸.

32. If an adult is incapable in relation to a decision about participation in surgical, medical nursing, dental or psychological research, unless—

¹⁰³ Section 49 of the 2000 Act.

¹⁰⁴ Section 50(1) and (2) of the 2000 Act.

¹⁰⁵ Section 50(3) of the 2000 Act.

¹⁰⁶ Section 50(3) to (6) of the 2000 Act.

¹⁰⁷ Section 50(7) and (8) of the 2000 Act.

¹⁰⁸ Section 50(1) of the 2000 Act.

- (i) research of a similar nature cannot be carried out on an adult who is capable in relation to such a decision;
- (ii) the purpose of the research is to obtain knowledge of causes, diagnoses, treatment or care of the adult's incapacity or the effect of any treatment or care given during his incapacity;
- (iii) the research is likely to produce real and direct benefit to the adult or will contribute, through significant improvement in the scientific understanding of the adult's incapacity, to the attainment of real and direct benefit to the adult or to other persons having the same incapacity;
- (iv) the adult does not indicate unwillingness to participate in the research;
- (v) the research has been approved by the Ethics Committee¹⁰⁹;
- (vi) the research entails no foreseeable risk or only a minimal foreseeable risk to the adult;
- (vii) the research imposes no discomfort or only minimal discomfort on the adult; and
- (viii) consent has been obtained from any guardian or welfare attorney who has power to consent to the adult's participation in research or, where there is no such guardian or welfare attorney, from the adult's nearest relative. Reference to a guardian or welfare attorney includes those appointed under other jurisdictions who are recognised by Scots law¹¹⁰.

¹⁰⁹ Section 51(6) of the 2000 Act. The Ethics Committee can impose such conditions as it sees fit when it grants the approval: section 51(5) of the 2000 Act. The Scottish Ministers may by Regulations prescribe matters which the Ethics Committee shall take into account when deciding whether to approve any research: section 51(7) of the 2000 Act.

¹¹⁰ Section 31(8) of the 2000 Act.

33. Any decision other than those relating to medical treatment where a guardian, welfare attorney or authorised person has been appointed, can be appealed by any person having an interest in the personal welfare of the adult to the Sheriff and thence with the leave of the Sheriff to the Court of Session¹¹¹.

Intervention Orders and Guardianship Orders

Intervention Orders

34. Any one (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates, can apply to the Sheriff for an intervention order. Local authorities are required to apply for intervention orders if it appears to the local authority that the adult is incapable, no application has been made or is likely to be made for an intervention order and an intervention order is necessary for the protection of the property, financial affairs or personal welfare of the adult¹¹². Any intervention order granted may direct the taking of any action, or may direct the authorised person nominated in the application to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as are specified in the order¹¹³. If the intervention order relates to the acquisition or disposal of accommodation in which the adult lives, the Public Guardian's consent is required¹¹⁴. If an intervention order is granted then anything done under the intervention order has the same effect as if done by the adult if he had capacity¹¹⁵. The 2000 Act gives protection to those dealing with the person authorised under an intervention order, who purports to act as such if the third party is acting in good faith¹¹⁶. Any one authorised under an intervention order may not place the adult in a hospital for the treatment of mental disorder against his will, consent on behalf of the adult to any form of treatment to which Part X (consent to treatment) of the 1984 Act applies¹¹⁷, or any medical

¹¹¹ Section 52 of the 2000 Act.

¹¹² Section 53(3) of the 2000 Act.

¹¹³ Section 33(5) of the 2000 Act.

¹¹⁴ Section 53(6) of the 2000 Act.

¹¹⁵ Section 53(9) of the 2000 Act.

¹¹⁶ Section 53(11) and (13) of the 2000 Act.

¹¹⁷ The reference to Part X of the 1984 Act will be removed by Schedule 5 of the 2003 Act.

treatment specified in Regulations made by the Scottish Ministers¹¹⁸. Powers relating to the personal welfare of an adult under an intervention order may be exercised when the adult is not in Scotland¹¹⁹. The person authorised by the intervention order will be personally liable under any transaction entered into unless he discloses that he is acting as guardian of the adult. The authorised person's personal loss can be made good from the adult's estate if this is the only breach of the requirements of the 2000 Act¹²⁰.

35. Any one authorised under an intervention order must keep records of the exercise of his powers¹²¹ and must notify the Public Guardian of any change of his address or of any change in the address of the adult. The Public Guardian will keep the particulars in the Register updated and notify the local authority and where appropriate the Mental Welfare Commission of any changes¹²².

Intervention orders and guardianship

36. An intervention order or guardianship order ceases to have effect on the adult's death¹²³. The authorised person or guardian will be entitled to act until he becomes aware of the death or any other event terminating his authority, provided he acts in good faith¹²⁴. There are protections for third parties acting in good faith relying on the authority of the intervention order or guardian if the authorised person or guardian is unaware of the termination or ending of that authority¹²⁵. The guardian includes a reference to the guardian appointed in another jurisdiction which is recognised by Scots law¹²⁶.

Guardianship

37. An application can be made for an individual or office holder to be appointed as guardian in relation to an adult's property, financial affairs or personal welfare by any person (including the adult himself) claiming an interest in the property, financial affairs or personal

¹¹⁸ Sections 53(14) and 64(2) of the 2000 Act.

¹¹⁹ Section 53(14) and 67(3) of the 2000 Act.

¹²⁰ Section 53(14) and 67(4) of the 2000 Act.

¹²¹ Section 54 of the 2000 Act.

¹²² Section 55 of the 2000 Act.

¹²³ Section 77(1) of the 2000 Act.

¹²⁴ Section 77(2) of the 2000 Act.

¹²⁵ Section 77(3) and (4) of the 2000 Act.

¹²⁶ Section 77(5) of the 2000 Act.

welfare of that adult in the same way as an application is made for an intervention order¹²⁷. When an application is made, and before disposal of the application, the sheriff may appoint an interim guardian. If he does so, the interim guardian's appointment will end on the appointment of the guardian or after 3 months, whichever is earlier¹²⁸. Before granting an application for guardianship or interim guardianship the sheriff must be satisfied that (a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare and (b) he is likely to continue to be so incapable and (c) that no other means provided by or under the 2000 Act would be sufficient to enable the adult's interest in his property, financial affairs or personal welfare to be safeguarded or promoted¹²⁹. Therefore interim guardianship should not be sought when an interim order under section 3(2)(d) or an intervention order would suffice¹³⁰. A guardianship order is for a 3 year period or such other period as the sheriff, on cause shown, may determine¹³¹. More than one guardian can be appointed for an adult, each with different powers¹³². Caution is usually required in making a guardianship order or an intervention order¹³³. Guardianship orders are registered with the Public Guardian¹³⁴ and the Public Guardian notifies the relevant authorities and the adult¹³⁵. If the guardianship order is sought, a sheriff is empowered to grant an intervention order instead and is obliged to do so when intervention order is appropriate and will suffice¹³⁶. Section 71(4) of the 2000 Act empowers sheriffs to grant an intervention order when recalling a guardianship order¹³⁷. Sheriffs are also empowered then to grant an intervention order when they are recalling the guardianship order. The maximum period for renewals of a guardianship order is 5 years¹³⁸. Where property and financial powers are conferred under the variation procedure on a guardian hitherto having welfare powers only, or vice versa, the normal initial maximum of 3 years applies because section 74(4) of the 2000 Act requires such variation to proceed as a fresh application under section 57 of the 2000 Act.

¹²⁷ Section 57 of the 2000 Act.

¹²⁸ Section 57(5) and (6) of the 2000 Act.

¹²⁹ Section 58(1) of the 2000 Act.

¹³⁰ Section 58(3) of the 2000 Act.

¹³¹ Section 58(4) of the 2000 Act.

¹³² Section 58(5) of the 2000 Act.

¹³³ Sections 53(7) and 58(6) of the 2000 Act.

¹³⁴ Section 58(7) of the 2000 Act.

¹³⁵ Section 58(7) of the 2000 Act, subject to section 11 of the 2000 Act.

¹³⁶ Section 58(1) of the 2000 Act.

¹³⁷ Section 71(4) of the 2000 Act.

¹³⁸ Section 60(4)(b) of the 2000 Act

38. Individuals can only be appointed as guardians if they consent to being appointed. The only other person who can be appointed is the chief social work officer of the local authority, who, in any event, can only be appointed in relation to the personal welfare of the adult¹³⁹. A sheriff must not appoint an individual as a guardian unless he determines that the individual is suitable. There are various criteria for deciding this¹⁴⁰.

39. Similar provisions relate to the application for renewal of a guardianship order by the sheriff except that the renewal is for 5 years instead of 3¹⁴¹. If an application for renewal of a guardianship order is made before the order itself ends, the order continues to have effect until the application is determined¹⁴². Similar provisions apply regarding appointment of joint guardians¹⁴³. Two or more individuals can seek appointment together as joint guardians or an individual can seek appointment as an additional guardian jointly with one or more existing guardians¹⁴⁴. Only parents, siblings or children of the adult can be appointed as joint guardians or, where the sheriff is satisfied that in the circumstances it is appropriate to appoint as joint guardians individuals who are not related to the adult as mentioned above¹⁴⁵. The requirement as to suitability for appointment also applies to joint guardians¹⁴⁶. If joint guardians do agree as to the exercise of their functions either or both of them can apply to the sheriff for directions under section 3 of the 2000 Act¹⁴⁷. If there are joint guardians a third party in good faith is entitled to rely on the authority to act of any one or more of them.¹⁴⁸

40. A sheriff may also appoint a substitute guardian who would act as guardian in event of the original guardian becoming unable to act. Any person capable of being appointed as a guardian can be appointed as a substitute guardian¹⁴⁹. The substitute guardian's appointment shall be for the same period as the appointment of the original guardian¹⁵⁰. The appointment and notification procedures are the same for substitute guardians as they are for other

¹³⁹ Section 59(1) and (2) of the 2000 Act.

¹⁴⁰ Section 59(3) and (4) of the 2000 Act.

¹⁴¹ Section 60 of the 2000 Act.

¹⁴² Section 60(1) of the 2000 Act.

¹⁴³ Section 62 of the 2000 Act.

¹⁴⁴ Section 62(1) of the 2000 Act.

¹⁴⁵ Section 62(2) of the 2000 Act.

¹⁴⁶ Section 62(4) of the 2000 Act.

¹⁴⁷ Section 62(8) of the 2000 Act.

¹⁴⁸ Section 62(9) of the 2000 Act.

¹⁴⁹ Section 63(1) of the 2000 Act.

¹⁵⁰ Section 63(3) of the 2000 Act.

guardians¹⁵¹. Unless otherwise specified in his appointment, the substitute guardian has the same functions and powers as those of the original guardian¹⁵².

41. An order appointing a guardian may confer on him:

- Power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be certified in the Order.
- Power to deal with all aspects of the personal welfare of the adult or with such aspects as may be specified in the order.
- Power to pursue or defend an action of declarator of nullity of marriage or of divorce or separation in the name of the adult.
- Power to manage the property or personal affairs of the adult or such parts of them as may be specified in the order.
- Power to authorise the adult to carry out such transactions or categories of transactions as the guardian may specify.

42. The guardian may not place the adult in a hospital for treatment of a mental disorder against his will or consent on behalf of the adult to any form of treatment prescribed by the Scottish Ministers under section 47(2) or treatment under Part X of the 1984 Act¹⁵³¹⁵⁴. Beyond that the Scottish Ministers may make Regulations defining the scope of guardians' powers¹⁵⁵. A guardian with property and financial powers must comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult insofar as he is also complying with the scope of his authority¹⁵⁶. Welfare guardians are also under the supervision of local authorities¹⁵⁷. Guardians with powers relating to property

¹⁵¹ Section 63(3) to (9) of the 2000 Act.

¹⁵² Section 63(10) of the 2000 Act.

¹⁵³ Section 48(1) will, however, be repealed by the 2003 Act: Part 1 of Schedule 5 to the 2003 Act.

¹⁵⁴ Section 64(1) and (2) of the 2000 Act. This also applies to those authorised by an intervention order: section 53(4) of the 2000 Act.

¹⁵⁵ Section 64(11) of the 2000 Act.

¹⁵⁶ Section 64(7) of the 2000 Act.

¹⁵⁷ Section 10(1)(a) of the 2000 Act.

and financial affairs of an adult must, unless the sheriff otherwise directs, prepare a management plan which must be approved by the Public Guardian. Until the management plan is approved, the guardian only has the power to ingather and take control of the adult's estate. The guardian must keep the management plan under review. Management plans can be varied¹⁵⁸. A Public Guardian's decision about a management plan can be appealed to the sheriff¹⁵⁹.

43. A financial guardian must submit an inventory of the adult's estate which falls within the guardian's authority to the Public Guardian within 3 months of his appointment¹⁶⁰. There are various controls relating to money, investments and businesses of the adult, as well as the purchase or disposal of accommodation¹⁶¹. Accounts must be submitted to the Public Guardian by any guardian with powers relating to the property or financial affairs of an adult¹⁶². Guardians are required to keep records of the exercise of their powers¹⁶³. Guardians of property and financial powers can make gifts out of the adult's estate if authorised to do so by the Public Guardian¹⁶⁴.

44. The adult will have no capacity to enter into any transaction in relation to any matter which is within the scope of the guardian's authority except where he has been authorised by the guardian to so act, although this will not affect the capacity adult in relation to any other matter¹⁶⁵. A guardian with property or financial powers has power, subject to the terms of the order appointing him, over any part of the adult's estate, wherever situated, and will also have the power to require a payment due to the adult to be made to the guardian so far as that payment falls within the scope of the guardian's authority¹⁶⁶. A guardian with powers relating to personal welfare of the adult can exercise the powers whether or not the adult is in Scotland¹⁶⁷. The guardian should disclose that he is acting as the guardian of the adult and if he does not do so, he will be personally liable for the transaction, although he will be entitled to be reimbursed from the estate of the adult in respect of any loss suffered by him as a result

¹⁵⁸ Paragraph 1 of Schedule 2 to the 2000 Act.

¹⁵⁹ Paragraph 2 of Schedule 2 to the 2000 Act.

¹⁶⁰ Paragraph 3 of Schedule 2 to the 2000 Act.

¹⁶¹ Paragraphs 4 to 6 of Schedule 2 to the 2000 Act.

¹⁶² Paragraph 7 and 8 of Schedule 2 to the 2000 Act.

¹⁶³ Section 65 of the 2000 Act.

¹⁶⁴ Section 66 of the 2000 Act.

¹⁶⁵ Section 67(1) of the 2000 Act.

¹⁶⁶ Section 67(2) of the 2000 Act.

¹⁶⁷ Section 67(3) of the 2000 Act.

of this, unless he is also acting outwith the scope of his authority or in breach of any other requirement of the 2000 Act relating to guardians. He will also be liable if he acts outwith the scope of his authority¹⁶⁸. If the adult is given authority to act by the guardian, then the transaction entered into by the adult with the third party who is aware at the date of entry into the transaction that such authority has been given, the transaction will not be void only on the ground that the adult lacked capacity¹⁶⁹. There are also protections for third parties acting in good faith in a transaction for value with a guardian¹⁷⁰. Section 67 of the 2000 Act covers guardians appointed in another jurisdiction who are recognised by Scots law¹⁷¹.

45. There are provisions regarding reimbursement and remuneration of guardians¹⁷². A guardian may forfeit his remuneration if he is in breach of any duty of care, fiduciary duty or obligation imposed by the 2000 Act¹⁷³. A sheriff may grant orders enforcing decisions of a guardian with powers relating to the personal welfare of the adult if such decisions are not complied with by the adult or by any other person and they might reasonably be expected to comply with the decision¹⁷⁴. In these provisions guardian includes a guardian appointed under another jurisdiction which is recognised by Scots law.

46. On an application made by an adult subject to a guardianship order or by any other person claiming an interest in the adult's property, financial affairs or personal welfare, the sheriff may replace a guardian with another suitable individual or office holder, remove a guardian¹⁷⁵ or recall a guardianship order or otherwise terminate a guardianship¹⁷⁶ and if the sheriff recalls the guardianship order, he may at the same time make an intervention order¹⁷⁷. A guardian in this context includes a guardian appointed under another jurisdiction which is recognised by the law of Scotland¹⁷⁸. An application is required by a guardian wishing to

¹⁶⁸ Section 67(4) of the 2000 Act.

¹⁶⁹ Section 67(5) of the 2000 Act.

¹⁷⁰ Section 67(6) of the 2000 Act and section 79 of the 2000 Act.

¹⁷¹ Section 67(7) of the 2000 Act.

¹⁷² Section 68 of the 2000 Act.

¹⁷³ Section 69 of the 2000 Act.

¹⁷⁴ Section 70 of the 2000 Act.

¹⁷⁵ If he is satisfied that there is a substitute guardian who is prepared to act, or in the case where there are joint guardians that the remaining guardian or guardians are prepared to continue to act: section 71(1)(b) of the 2000 Act.

¹⁷⁶ If he is satisfied that the grounds for appointment of a guardian are no longer fulfilled or that the interests of the adult in his property, financial affairs, personal welfare can be satisfactorily safeguarded or promoted otherwise than by guardianship: section 71(1)(c) of the 2000 Act.

¹⁷⁷ Section 71(4) of the 2000 Act.

¹⁷⁸ Section 71(5) of the 2000 Act.

resign where there is no joint or substitute guardian to provide continuity¹⁷⁹. A guardian with financial powers can be given a discharge if the guardianship order appointing him is recalled, on the resignation, removal or replacement of the guardian or on the death of the adult¹⁸⁰. The Public Guardian at his own instance, or on an application by any person (including the adult himself) claiming an interest in the property and financial affairs of an adult who has had a guardian appointed to him, may recall the powers of a guardian relating to the property or financial affairs of the adult if it appears to him that the grounds for the guardian's appointment are no longer fulfilled or the interests of the adult in his property and financial affairs can be satisfactorily guaranteed or promoted otherwise than by guardianship. The Mental Welfare Commission or the local authority in whose area an adult in respect of whom a guardian has been appointed habitually resides (other than a local authority whose chief social work officer has been appointed guardian) at their own instance, or on an application by any person (including the adult himself) claiming an interest in the personal welfare of the adult, may recall the powers of the guardian relating to the personal welfare of the adult if it appears to them that the grounds for appointment of the guardian with such powers are no longer fulfilled or the interests of the adult in his personal welfare are satisfactorily safeguarded or promoted otherwise than by guardianship¹⁸¹. On application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of the adult, the sheriff may vary the powers conferred by any guardianship order¹⁸². Joint guardians and guardians in respect of whom a substitute guardian has been appointed may resign by giving notice of their intention to do so to the Public Guardian and the local authority and, in relevant cases, the Mental Welfare Commission¹⁸³. The resignation only takes effect if the remaining joint guardian is willing to continue to act or the substitute guardian is willing to act¹⁸⁴. A substitute guardian who has not subsequently become guardian may resign by giving notice in writing to the Public Guardian and the local authority and, in relevant cases, the Mental Welfare Commission¹⁸⁵. A guardian who has no joint guardian and in respect of whom no substitute guardian has been appointed or who is a joint guardian or guardian in respect of whom a substitute has been appointed but who cannot resign because the remaining joint guardian is not willing to

¹⁷⁹ Section 75(5) of the 2000 Act.

¹⁸⁰ Section 72 of the 2000 Act.

¹⁸¹ Section 73 of the 2000 Act.

¹⁸² Section 74 of the 2000 Act.

¹⁸³ Section 75(4) of the 2000 Act.

¹⁸⁴ Section 75(1) to (3) of the 2000 Act.

¹⁸⁵ Section 75(4) of the 2000 Act.

continue to act or the substitute guardian is not willing to act, cannot resign until a replacement guardian has been appointed by the sheriff¹⁸⁶.

47. If an adult whose guardian is the chief social work officer of the local authority changes his place of habitual residence to the area of another local authority, the chief social work officer of the receiving authority becomes the guardian on receipt of notification from the old local authority's chief social work officer.¹⁸⁷ The termination of guardianship on death provisions are the same as those for an intervention order.¹⁸⁸ Protection of third parties acting in good faith for value transacting with the guardian are recruited in section 79 of the 2000 Act.

Miscellaneous

48. Continuing attorneys, welfare attorneys, withdrawers, guardians, persons authorised under intervention orders and managers of establishments who use an adult's funds in breach of their fiduciary duty or outwith their authority or after receiving information of termination or suspension of their authority or power must repay the funds with interest.¹⁸⁹ Guardians are also liable to make good any deficiency revealed by their accounts as approved by the Public Guardian¹⁹⁰. In such cases the Public Guardian may require the guardian to pay interest too.¹⁹¹ No liability is, however, incurred by a guardian, continuing attorney, welfare attorney, person authorised under an intervention order, a withdrawer or the managers of an establishment for any breach of any duty of care or fiduciary duty owed to the adult if he or they have acted reasonably and in good faith in accordance with the general principles set out in section 1 of the 2000 Act or have failed to act and the failure was reasonable and in good faith and in accordance with general principles.¹⁹² A guardian and an attorney include a reference to a guardian and attorney appointed in another jurisdiction but recognised by Scots law.¹⁹³

¹⁸⁶ Section 75(5) of the 2000 Act.

¹⁸⁷ Section 76 of the 2000 Act. Provision is made for relevant intimations.

¹⁸⁸ Section 77 of the 2000 Act.

¹⁸⁹ Section 81 of the 2000 Act.

¹⁹⁰ Paragraph 8(6) of Schedule 2 to the 2000 Act.

¹⁹¹ Paragraph 8(7) of Schedule 2 to the 2000 Act.

¹⁹² Section 82(1) of the 2000 Act.

¹⁹³ Section 82(2) of the 2000 Act.

49. It is an offence for any person exercising powers under the 2000 Act relating to the personal welfare of an adult to ill-treat or wilfully neglect that adult.¹⁹⁴

50. The Act applies to guardians appointed under the 1995 Act¹⁹⁵ in the same way as it applies to guardians with powers relating to the personal welfare of an adult appointed under the 2000 Act.

51. Schedule 3 to the 2000 Act makes provision for jurisdiction in relation to private international law matters. It specifies when the Scottish courts will have jurisdiction, which sheriff will have jurisdiction, what the applicable law is in relation to an adult, and makes provision for recognition and enforcement of measures taken under the law of other countries for the personal welfare or protection of properties of adults with incapacity.

¹⁹⁴ Section 83(1) of the 2000 Act.

¹⁹⁵ Sections 57(2)(c) and 58(1) of the 1995 Act.

Summary of the 2003 Act

1. The 2003 Act, which received Royal Assent on 25 April 2003, is expected to become operational in October 2005. There is therefore no information as yet on how the provisions of the 2003 Act will work in practice¹⁹⁶.
2. The 2003 Act will cover all those with a “mental disorder” which is defined as any mental illness, personality disorder or learning disability¹⁹⁷. Therefore those with a learning disability without further mental illness or personality disorder will be covered by the provisions of the 2003 Act.

The Tribunal

3. The Tribunal will act as an independent judicial body which will authorise compulsory treatment orders and deal with appeals against and reviews of compulsory treatment orders, short-term detention, compulsion orders and other mental health disposals affecting mentally disordered offenders¹⁹⁸. The Tribunal substantially replaces the role of the sheriff under previous mental health legislation.
4. When the Tribunal discharges one of its functions, a tribunal will be selected by the President. Ordinarily it will consist of a convener, who will be the President or legal member, a medical member and a general member. In cases where the Tribunal receives a restricted patient application, the convener must be the President or a sheriff convener¹⁹⁹.
5. The President is responsible for ensuring that the Tribunal discharges its functions efficiently and effectively²⁰⁰. The President has the power to give directions, and issue guidance, about the administration of the Tribunal²⁰¹.
6. The Tribunal has the power to require by citation any person to attend to give evidence at any hearing or to produce documents held by them²⁰². The Tribunal may require a witness to give evidence on oath or to affirm. Non-compliance with a citation without reasonable excuse, is an offence, subject to specified penalties

¹⁹⁶ The 2003 Act retains the Mental Welfare Commission for Scotland (section 4(1) of the 2003 Act) which will submit an annual report to the Scottish Ministers which will be laid before the Parliament (section 18 of the 2003 Act). The Commission will also have to provide and publish such statistical information as the Scottish Ministers may direct relating to the discharge of its functions (section 19 of the 2003 Act).

¹⁹⁷ Section 328(1) of the 2003 Act. A person is not mentally disordered by reason only of among other things any of the following: dependence on, or use of, alcohol or drugs; behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person; or acting as no prudent person would act: section 328(2) of the 2003 Act.

¹⁹⁸ Section 21(1) and (2) of the 2003 Act.

¹⁹⁹ Paragraph 7 of Schedule 2 to the 2003 Act.

²⁰⁰ Paragraph 7(5) of Schedule 2 to the 2003 Act.

²⁰¹ Paragraph 7(6) of Schedule 2 to the 2003 Act.

²⁰² Paragraph 12 of Schedule 2 to the 2003 Act.

Duties on local authorities

Provision of services

7. There are provisions about duties on local authorities to provide services to those who have or have had a mental disorder, whether or not they are in hospital,²⁰³ which are additional to those already in place under the Social Work Scotland Act 1968²⁰⁴ and the Children (Scotland) Act 1995²⁰⁵.²⁰⁶ These additional services are:

7.1 Services that provide care and support. The services must be designed to minimise the effect of the mental disorder and to give the person the opportunity to lead as normal a life as possible. Such services might include practical and emotional support in a crisis, assistance with daily tasks, and accommodation with appropriate levels of support. It might also include the provision of residential accommodation²⁰⁷.

7.2 Services that are designed to promote the well-being and social development of those with a mental disorder. Such services could include social, cultural and recreational activities, training for those over school age and assistance for those over school age in obtaining and in undertaking employment²⁰⁸.

7.3 Assistance with transport.

8. In providing such services the local authorities must co-operate with Health Boards, Special Health Boards, and voluntary organisations who have an interest in the provision of those services or a power or duty in relation to the provision of services²⁰⁹. Health Boards and Special Health Boards must, if requested to do so by the local authorities, assist the local authorities with the provision of such services, provided that to do so is compatible with their own responsibilities²¹⁰.

9. Local authorities can charge for such services but if a user of the services satisfies the authority that they cannot afford to pay the authority's charge for the service provided, the authority may only charge what that person can practically afford. The Scottish Ministers may by Regulations exclude certain services from any charging regime²¹¹.

10. The Act also provides that a mental health officer can trigger the requirement for someone to be assessed for need for community care services under the Social Work Scotland

²⁰³ Sections 25 to 27 of the 2003 Act.

²⁰⁴ 1968, c.49, sections 12(1), 13A, 13B and 14 (the general duty to promote social welfare, and the duties to provide residential accommodation with nursing, to provide care and after-care, and to provide domiciliary and laundry services).

²⁰⁵ 1995, c.36, section 22(1).

²⁰⁶ Section 29 of the 2003 Act.

²⁰⁷ Section 59(1) of the Social Work Scotland Act 1968 (c.49) as amended by section 25(4) of the 2003 Act.

²⁰⁸ Without prejudice to the duties in relation to such activities contained in section 1 of the Education (Scotland) Act 1980 (c.44), and the duty on Scottish Ministers to provide further education under section 1 of the Further and Higher Education (Scotland) Act 1992 (c.37).

²⁰⁹ Section 30 of the 2003 Act.

²¹⁰ Section 31 of the 2003 Act.

²¹¹ Section 28 of the 2003 Act.

Act 1968²¹² and that local authorities must respond to requests for such assessments from any mentally disordered person or any named person^{213 214}.

Duty to inquire into individual cases

11. Section 33(1) of the 2003 Act places a duty on local authorities to inquire into situations where an adult mentally disordered person in its area may be at risk. A person is “at risk” where:

11.1 that person may be, or may have been, subject, or exposed, at some place other than a hospital to:

11.1.1 ill-treatment;

11.1.2 neglect; or

11.1.3 some other deficiency in care or treatment.

11.2 because of the mental disorder, the person’s property:

11.2.1 may be suffering, or may have suffered, loss or damage; or

11.2.2 may be, or may have been, at risk of suffering loss or damage.

11.3 that person may be:

11.3.1 living alone or without care; and

11.3.2 unable to look after himself or his property or financial affairs.

11.4 that person is not in hospital and because of the mental disorder, the safety of some other person may be at risk.

12. Local authorities may, where it is necessary for, or would assist, such inquiries, seek the co-operation of Health Boards, the Commission, the Public Guardian or the Scottish Commission for the Regulation of Care²¹⁵. A relevant mental health officer may be granted a warrant from a sheriff or justice of the peace for any of a range of purposes which may be relevant to the inquiry: to enter premises and open lockfast places; to detain a person for 3 hours for the purpose of a medical examination; or for a medical practitioner to have access to a person’s medical records²¹⁶. Such an examination could be a preliminary to emergency detention or short-term detention under the 2003 Act²¹⁷.

²¹² Section 227 of the 2003 Act.

²¹³ See paragraph 80 below in relation to named persons.

²¹⁴ Section 228 of the 2003 Act.

²¹⁵ Section 34 of the 2003 Act.

²¹⁶ Section 35 of the 2003 Act.

²¹⁷ See paragraphs 13 to 19 below.

EMERGENCY DETENTION IN HOSPITAL

13. The 2003 Act²¹⁸ provides an emergency procedure under which a mentally disordered person may be removed to hospital and detained in a hospital for up to 72 hours on the basis of an emergency detention certificate granted by a medical practitioner²¹⁹ with the consent, where practicable, of a mental health officer²²⁰. The grounds for such a certificate are:

13.1 the person is likely to have a mental disorder and it is likely that his or her ability to determine whether treatment is required is significantly impaired as a result of the mental disorder,

13.2 the person needs to be detained to assess whether treatment is required,

13.3 he or she urgently needs to go to hospital in the interests of his or her own health or safety or for the protection of others, and

13.4 there is no time to make arrangements for a short-term detention certificate.

14. Emergency detention does not give general authority to provide compulsory medical treatment²²¹ but urgent medical treatment may be administered²²². A fresh emergency detention certificate cannot be used immediately after the expiry of an emergency detention certificate, but a short-term detention certificate can be used to continue to detain the person in a hospital (See paragraph 16 below) under section 44 of the 2003 Act²²³, for a further 28 days if a psychiatrist recommends this.

SHORT-TERM DETENTION

15. Under the 2003 Act²²⁴ a mentally disordered person may be removed to hospital and detained in a hospital for up to 28 days on the basis of a short-term detention certificate granted by a psychiatrist with the consent of a mental health officer²²⁵. The grounds for such a certificate are that:

15.1 the person is likely to have a mental disorder and it is likely that his or her ability to determine whether treatment is required is significantly impaired as a result of the mental disorder,

15.2 the person needs to be detained to assess whether treatment is required or to give the person treatment,

²¹⁸ Section 36.

²¹⁹ As soon as practicable after the person is admitted, a psychiatrist checks whether the detention criteria are met and the emergency detention certificate will be revoked if they are not met: section 38(2) and 39 of the 2003 Act.

²²⁰ Mental health officers are to be appointed by local authorities under section 32 of the 2003 Act.

²²¹ If the detained person was subject to a compulsory treatment order immediately before being detained under an emergency detention certificate then any medical treatment authorised by the compulsory treatment order may continue while the emergency detention certificate is in force: section 43 of the 2003 Act.

²²² Section 243 of the 2003 Act.

²²³ Section 26 can only be used to continue to detain someone who has been detained under section 24 of the 1984 Act.

²²⁴ Section 44.

²²⁵ Mental health officers are to be appointed by local authorities under section 32 of the 2003 Act.

15.3 if the person were not detained there would be a significant risk to his or her own health or safety or for the safety of others, and

15.4 the granting of the short-term detention certificate is necessary²²⁶.

16. A short-term detention certificate cannot be granted if the person is already detained unless he is detained under an emergency detention certificate²²⁷. But unlike the 1984 Act it is not necessary for the person to be detained under an emergency certificate before being detained under a short-term certificate under the 2003 Act²²⁸. Short-term detention certificates give general authority to provide compulsory medical treatment²²⁹.

17. A fresh short-term detention certificate cannot be used immediately after the expiry of a short-term certificate, but an extension certificate can extend the short-term detention period for up to 3 days if a psychiatrist certifies that:

17.1 the person is suffering from a mental disorder,

17.2 the person's ability to determine whether treatment is required is significantly impaired as a result of the mental disorder,

17.3 the person needs to be detained to assess whether treatment is required or to give the person treatment,

17.4 if the person were not detained there would be a significant risk to his or her own health or safety or for the safety of others, and

17.5 because of a change in the person's mental health an application for a compulsory treatment order is required,

and if the psychiatrist obtains the consent of a mental health officer, if practicable.

18. The hospital authorities must keep the need for detention under review and revoke the relevant certificate if the detention criteria are no longer met²³⁰. The detained person has the right to apply to the Tribunal for revocation of the certificate²³¹ and a short-term certificate is automatically revoked if a compulsory treatment order is made in respect of the detained person²³².

19. The Commission has the power²³³ to revoke a short-term detention certificate or an extension certificate where it is satisfied that:

²²⁶ Section 44(4) of the 2003 Act.

²²⁷ Section 44(1) and (2) of the 2003 Act.

²²⁸ Section 44 of the 2003 Act and section 26(1) of the 1984 Act.

²²⁹ Section 44(5)(c) of the 2003 Act. If the detained person was subject to a compulsory treatment order immediately before being detained under a short-term detention certificate then the CTO is suspended while the short-term certificate is in force: section 56(2) of the 2003 Act.

²³⁰ Section 49 of the 2003 Act.

²³¹ Section 50 of the 2003 Act.

²³² Section 70 of the 2003 Act.

²³³ Under section 51 of the 2003 Act.

- 19.1 the person is not mentally disordered;
- 19.2 the person's ability to make decisions about the provision of medical treatment is not significantly impaired or is significantly impaired but not because of the person's mental disorder;
- 19.3 if the person were not detained there would not be a significant risk to the health, safety or welfare of the mentally disordered person or the safety of anyone else; or
- 19.4 it does not continue to be necessary for the detention in hospital of the person to be authorised by the certificate.

COMPULSORY TREATMENT ORDERS

20. A compulsory treatment order²³⁴ is an order which is made by the Tribunal²³⁵ which may authorise detention in hospital and various other community-based measures. The Tribunal can only make a compulsory treatment order where it is satisfied that:

- 20.1 the person has a mental disorder;
- 20.2 that medical treatment which would be likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the disorder, is available for the patient;
- 20.3 that if the person were not provided with such medical treatment there would be a significant risk to the health, safety or welfare of the patient or to the safety of any other person;
- 20.4 that because of the mental disorder the person's ability to make decisions about the provision of such medical treatment is significantly impaired;
- 20.5 that the making of the CTO in respect of the person is necessary; and
- 20.6 where the Tribunal does not consider it necessary for the person to be detained in hospital, certain other conditions which may be specified in Regulations²³⁶.

21. A compulsory treatment order lasts for 6 months unless revoked before then. However, it may be extended on the application of the mentally disordered person's responsible medical officer for a further 6 month period and then for periods of 12 months at a time²³⁷. The Tribunal may grant interim compulsory treatment orders²³⁸ while the application for the compulsory treatment order is being considered²³⁹ if it is satisfied that:

²³⁴ Which replaces the detention of people under section 18 of the 1984 Act.

²³⁵ Under section 64 of the 2003 Act.

²³⁶ Section 64(4)(a) and (5) of the 2003 Act.

²³⁷ Section 64(4) of the 2003 Act.

²³⁸ The Tribunal may do so at its own discretion or on the application of any party with an interest in the proceedings: section 65.

²³⁹ Section 65 of the 2003 Act.

- 21.1 the person has a mental disorder;
- 21.2 that medical treatment which would be likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the disorder, is available for the patient;
- 21.3 that if the person were not provided with such medical treatment there would be a significant risk to the health, safety or welfare of the patient or to the safety of any other person;
- 21.4 that because of the mental disorder the person's ability to make decisions about the provision of such medical treatment is significantly impaired; and
- 21.5 that the making of the interim CTO in respect of the person is necessary²⁴⁰.

22. An interim compulsory treatment order lasts for up to 28 days²⁴¹ and may not be extended, although the Tribunal may make more than one interim order provided that the total detention period authorised by those interim orders does not exceed 56 continuous days²⁴². If the person for whom a CTO is applied for is already subject to a short-term detention certificate (or an extension certificate), the person's detention in hospital under authority of the certificate is automatically extended for a further five working days to enable the Tribunal to have sufficient time to come to a decision on the application²⁴³. In such a case the Tribunal must either make an interim compulsory treatment order or determine the application for the CTO before the end of that extended period²⁴⁴.

23. The measures authorised by a compulsory treatment order and an interim compulsory treatment²⁴⁵ order are specified by the Tribunal²⁴⁶ but may subsequently be varied by the Tribunal. The measures which can be specified are:²⁴⁷

- 23.1 detention in a specified hospital;
- 23.2 the giving of compulsory medical treatment under the 2003 Act;
- 23.3 imposition of a requirement to attend on certain dates or at certain intervals specified places to receive medical treatment or community care services
- 23.4 imposition of a requirement to reside in a certain place and/or to allow the mental health officer, responsible medical officer and person responsible for providing treatment or services to visit the person in the place where the person resides;

²⁴⁰ Section 65(2) and (6) of the 2003 Act.

²⁴¹ Section 65(2) of the 2003 Act.

²⁴² Section 65(3) of the 2003 Act.

²⁴³ Section 68 of the 2003 Act.

²⁴⁴ Section 69 of the 2003 Act.

²⁴⁵ If a CTO is made then the interim CTO is automatically revoked: section 75.

²⁴⁶ Sections 64(4)(a)(i), 65(2)(a) and 66(1) of the 2003 Act.

²⁴⁷ Section 66(1) of the 2003 Act.

23.5 imposition of a requirement on the person to get the approval of the mental health officer of any proposed change of address and/or to inform the mental health officer of any change of address before it takes place.

24. The responsible medical officer has power to suspend the effect of the order for temporary periods or to revoke it.²⁴⁸ The mentally disordered person and the mentally disordered person's named person²⁴⁹ also have the right to apply to the Tribunal for revocation or variation of the order.²⁵⁰ The Commission can also revoke the order²⁵¹.

25. The 2003 Act requires the responsible medical officer of a mentally disordered person who is subject to a compulsory treatment order to carry out a review.²⁵² A compulsory treatment order lasts for 6 months and the first review must be carried out in the two months before the order is due to expire.

26. There are three possible outcomes of a review of an order: revocation²⁵³, extension²⁵⁴ or application to the Tribunal for an extension and variation of the order²⁵⁵.

27. Provision for the disposal by the criminal courts of persons with mental disorder involved in criminal proceedings is made principally by Part VI and sections 200 and 230 of the 1995 Act. The 2003 Act amends the 1995 Act by providing for two new pre-sentence disposals (assessment orders and treatment orders)²⁵⁶, to replace interim hospital orders and hospital orders with interim compulsion orders and compulsion orders respectively²⁵⁷, providing courts with power to detain acquitted persons²⁵⁸ and makes minor changes to the provisions on remanding accused persons for inquiry into mental health²⁵⁹ and on probation²⁶⁰ with a requirement that the person receives treatment for his or her mental disorder. In addition, the 2003 Act provides for the transfer of mentally disordered prisoners to hospital²⁶¹.

Assessment orders: new sections 52B to 52J to the 1995 Act

28. Under the new provisions, where it appears to the prosecutor that a person has been charged with an offence, disposal has not yet been made in the proceedings in respect of the offence and the person appears to be suffering from a mental disorder, the prosecutor has power to apply to the court for an assessment order²⁶². The Scottish Ministers will have a

²⁴⁸ Sections 72, 79 and 80 of the 2003 Act.

²⁴⁹ See paragraph 80 below.

²⁵⁰ Sections 99, 100, 103 and 106-108 of the 2003 Act.

²⁵¹ Sections 73 and 81 of the 2003 Act.

²⁵² Sections 77 and 78 of the 2003 Act.

²⁵³ Sections 79 and 80 of the 2003 Act.

²⁵⁴ Section 86 of the 2003 Act. This decision can be reviewed by the Tribunal: sections 101 and 102 of the 2003 Act.

²⁵⁵ Sections 83, 8-95, 103 and 105-110 of the 2003 Act.

²⁵⁶ Section 130 of the 2003 Act inserts new sections 52A to 52U into the 1995 Act.

²⁵⁷ Section 131 of the 2003 Act substitutes a new section 53 and inserts new sections 53A to 53D into the 1995 Act and section 133 of the 2003 Act inserts new sections 57A to 57D into the 1995 Act.

²⁵⁸ Section 134 of the 2003 Act inserts new sections 60C and 60D into the 1995 Act.

²⁵⁹ Section 132 of the 2003 Act.

²⁶⁰ Section 135 of the 2003 Act.

²⁶¹ Section 135 of the 2003 Act.

²⁶² New section 52B of the 1995 Act.

similar power where the person is in custody but has not yet been sentenced²⁶³. A court will also be able to make an assessment order on its own initiative without an application having been made if it appears to the court that the person may have a mental disorder and the person has not been sentenced.

29. On the evidence of a medical practitioner that:

29.1 there are reasonable grounds for believing that the person has a mental disorder and that detention in hospital is necessary to assess whether the conditions:

29.1.1 that the person has a mental disorder;

29.1.2 that medical treatment which is likely to prevent the disorder worsening or to alleviate the symptoms or effects of it is available; and

29.1.3 that, if the person were not provided with that treatment, there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person

are met²⁶⁴ and that there would be a significant risk to the health, safety or welfare of the person or to the safety of any other person if the order were not made;

29.2 the hospital proposed by the medical practitioner is suitable for assessing whether the assessment conditions are satisfied, could admit the person within 7 days of the making of the order and is suitable for the detention and assessment of that person; and

29.3 that it would not be reasonably practicable to carry out the assessment unless the assessment order was made²⁶⁵.

30. The court must also be satisfied that the order is appropriate in all the circumstances and have regard to any alternative means of dealing with the person²⁶⁶.

31. An assessment order may be made only in respect of a person who has not been sentenced²⁶⁷.

32. The measures which can be authorised by an assessment order, are:

32.1 the removal, if necessary, of the person to the hospital specified in the order²⁶⁸;

32.2 the detention of the person for the period of 28 days in the specified hospital; and

²⁶³ New section 52C of the 1995 Act.

²⁶⁴ These conditions are “the assessment conditions”.

²⁶⁵ New sections 52D and 52E of the 1995 Act.

²⁶⁶ New sections 52D and 52E of the 1995 Act.

²⁶⁷ New section 52D(5) of the 1995 Act.

²⁶⁸ Under new section 52F of the 1995 Act another hospital can be substituted in certain situations.

32.3 the giving of compulsory medical treatment to the person in accordance with the 2003 Act²⁶⁹.

33. The responsible medical officer must provide a written report to the court within 28 days of the assessment order being made on the results of the assessment undertaken. Specifically, the responsible medical officer must report on whether the assessment conditions are met and on any other matters specified by the court.²⁷⁰ At that time the court can revoke the order and proceed with the case as it sees fit. If it receives the appropriate evidence and reports, the court may make a treatment order continuing the person's detention in hospital.

34. An assessment order will cease to have effect:

34.1 where treatment order is made;

34.2 where the person has been charged but no disposal as to the offence had been made when the order was made, the case is deserted, the person is acquitted or convicted or liberated in due course of law;

34.3 when the person has been convicted but not yet sentenced and where—

34.3.1 the sentence is deferred;

34.3.2 any of the orders below—

34.3.2.1 an interim compulsion order under section 53 of the 1995 Act;

34.3.2.2 a compulsion order under section 57A of the 1995 Act;

34.3.2.3 a guardianship order under section 58(1A) of the 1995 Act;

34.3.2.4 a hospital direction under section 59A of the 1995 Act;

34.3.2.5 an order under section 57 of the 1995 Act (disposals where person found to be criminally insane); or

34.3.2.6 a probation order under section 230 of the 1995 Act which includes a requirement as to medical treatment;

is made or

34.3.3 where any other sentence is imposed²⁷¹.

35. Where an assessment order expires because its limited duration has ended, the court can commit the person who was subject to the assessment order to prison or other institution or deal with the person as it considers appropriate²⁷².

²⁶⁹ New section 52D(6) of the 1995 Act.

²⁷⁰ New section 52G of the 2003 Act.

²⁷¹ New section 52H of the 1995 Act.

Treatment orders: new sections 52K–52S of the 1995 Act

36. Where it appears to the prosecutor that a person, who has been charged but in relation to whom no disposal has been made, may have a mental disorder, an application may be made to the court for a treatment order in respect of that person²⁷³. The Scottish Ministers will also have a similar power where the person charged is in custody but has not been sentenced.²⁷⁴ A court will also be able to make a treatment order on its own initiative without an application being made if it appears to the court that the person may have a mental disorder and the court is satisfied on the evidence of two medical practitioners that the assessment conditions²⁷⁵ are met and that there is a suitable hospital available for the admission of the person within 7 days of the order being made²⁷⁶. The court must also be satisfied that the order is appropriate in all the circumstances and have regard to any alternative means of dealing with the person. One of the medical practitioners, on whose evidence the court makes the order, must be an approved medical practitioner²⁷⁷.

37. A treatment order may be made only in respect of a person who has not been sentenced²⁷⁸.

38. The measures which can be authorised by a treatment order, are–

38.1 the removal, if necessary, of the person to the hospital specified in the order;

38.2 the detention of the person in the specified hospital²⁷⁹; and

38.3 the giving of compulsory medical treatment to the person²⁸⁰

39. The responsible medical officer must submit a report in writing to the court if the officer is satisfied that any of the assessment conditions are no longer met or there has been a change of circumstances since the order was made which makes detention of the person in hospital by virtue of the order no longer appropriate.

40. If the court, on receiving the report, is not satisfied that the person needs to be subject to the treatment order, it must revoke the treatment order and commit the person to prison or other institution or otherwise deal with the person as it considers appropriate. If the court is not satisfied that the person need not be subject to the treatment order it must confirm or vary the order or it can still decide to revoke the order²⁸¹.

41. Unless revoked earlier by the court, a treatment order remains in effect until one of the circumstances outlined in paragraphs 34.2 or 34.3 applies²⁸².

²⁷² New section 52J of the 1995 Act.

²⁷³ New section 52K of the 1995 Act.

²⁷⁴ New section 52L of the 1995 Act.

²⁷⁵ See paragraph 29.1 above.

²⁷⁶ New sections 52M and 52N of the 1995 Act.

²⁷⁷ Section 61(1) of the 1995 Act, as amended by the 2003 Act.

²⁷⁸ New section 52M(5).

²⁷⁹ This hospital can be varied in certain circumstances. New section 52P of the 1995 Act.

²⁸⁰ New section 52M(6) of the 1995 Act.

²⁸¹ New section 52Q of the 1995 Act.

²⁸² New section 52R of the 1995 Act.

42. Where a treatment order ceases to have effect otherwise than under paragraphs 40 and 41, the court can commit the person who was subject to the order to prison or another institution or deal with the person as it considers appropriate.²⁸³

Interim Compulsion Orders

43. An interim compulsion order authorises a period of hospital detention for assessment of an offender's mental disorder, the offender's needs and the risk posed, in order to inform the sentencing decision of the court. The order may be made if a court thinks that either a compulsion order combined with a restriction order or a hospital direction may be in prospect. The person made subject to the interim compulsion order has a right of appeal against it being made under the 1995 Act²⁸⁴.

44. The offenders who may be made subject to interim compulsion order, are:

44.1 persons convicted of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law); and

44.2 persons remitted to the High Court from the sheriff court for sentence for an offence punishable by imprisonment²⁸⁵.

45. Before it can make an interim compulsion order, the court must be satisfied on the evidence of two medical practitioners²⁸⁶, that the offender has a mental disorder, and that—

45.1 there are reasonable grounds for believing that—

45.1.1 medical treatment, which would prevent the mental disorder worsening or alleviate any of the symptoms or effects of the disorder and without which the offender would be a significant risk to his own health, safety or welfare or to the safety of someone else, is available; and

45.1.2 it is necessary to make an interim compulsion order;

45.2 there are reasonable grounds for believing that it would be appropriate to make either a compulsion order combined with a restriction order or a hospital direction in respect of the offender;

45.3 a hospital which is suitable for assessing the offender could admit them within 7 days of the order being made;

45.4 it would not be reasonably practicable for the assessment to be made without an interim compulsion order being made; and

²⁸³ New section 52S of the 1995 Act.

²⁸⁴ Section 60 of the 1995 Act, as amended by the 2003 Act.

²⁸⁵ New section 53(1) of the 1995 Act

²⁸⁶ One of whom must be an approved medical practitioner (see section 61(1) of the 1995 Act as amended by the 2003 Act)

45.5 that having regard to all the circumstances of the case (including the nature of the offence of which the person was convicted) and any alternative means of dealing with the person, the order is appropriate²⁸⁷.

46. An interim compulsion order can authorise—

46.1 the removal, if necessary, of the offender to the hospital specified in the order;

46.2 detention of the offender in that hospital for up to 12 weeks²⁸⁸; and

46.3 the giving of compulsory medical treatment to the offender in accordance with the 2003 Act²⁸⁹.

47. An interim compulsion order ceases to have effect if the court makes a compulsion order or hospital direction in relation to the offender or deals with the offender in any other way including imposing a sentence of imprisonment²⁹⁰.

Compulsion orders

48. Compulsion orders replace hospital orders under section 58(1) of the 1995 Act. The effect of a compulsion order is similar to that of a compulsory treatment order. Certain conditions apply to requiring treatment in hospital²⁹¹. The court can authorise a range of measures in a compulsion order including detention in hospital or compulsory treatment in the community. Those measures are authorised for a period of 6 months²⁹². A person made subject to a compulsion order has a right of appeal against the order being made²⁹³.

49. Offenders who may be made subject to a compulsion order are:

49.1 those convicted in the High Court or the sheriff court of an offence punishable by imprisonment (other than an offence the sentence for which is fixed by law); and

49.2 those remitted to the High Court from the sheriff court for sentence for an offence punishable by imprisonment²⁹⁴.

²⁸⁷ New section 53 of the 1995 Act.

²⁸⁸ This period can be extended for further periods of up to 12 weeks, subject to an overall cumulative maximum of 12 months: new section 53B(4) and (5) of the 1995 Act.

²⁸⁹ New section 53(8) of the 1995 Act

²⁹⁰ New section 53J of the 1995 Act.

²⁹¹ New section 57A(5) of the 1995 Act provides those conditions. They are that the court must be satisfied on the written or oral evidence of the two medical practitioners mentioned in paragraph 45 that (a) the medical treatment can only be provided if the offender is detained in hospital, (b) the offender could be admitted to the hospital to be specified within 7 days of the order being made, and (c) the hospital is suitable for giving that medical treatment to the offender.

²⁹² Where the court make the offender subject to a restriction order at the same time as a compulsion order, the measures specified in the compulsion order shall be authorised indefinitely and not limited to the period of 6 months: new section 57A(7) of the 1995 Act.

²⁹³ Section 60 of the 1995 Act (as amended by the 2003 Act).

²⁹⁴ New section 57A(1) of the 1995 Act.

50. Before making the order, the court must be satisfied on the evidence of two medical practitioners, one of whom must be an approved medical practitioner²⁹⁵ that the following conditions are met²⁹⁶—

50.1 that the offender has a mental disorder (provided both medical practitioners agree on the type of disorder the offender has)²⁹⁷;

50.2 that medical treatment which is likely to prevent the mental disorder worsening or alleviate any of the symptoms or effects of the mental disorder is available;

50.3 that, if the offender were not provided with medical treatment there would be significant risk to the health, safety or welfare of the offender or to the safety of any other person;

50.4 that the making of a compulsion order is necessary; and

that it is appropriate to make the order taking into consideration—

50.5 the mental health officer's report prepared under section 57C;

50.6 all the circumstances (including the nature of the offence of which the offender was convicted and the offender's past history); and

50.7 any alternative means of dealing with the offender.

51. Once a compulsion order (without an accompanying restriction order) is made, the measures specified in the order are authorised for a period of 6 months. The criteria for the making of a restriction order are set out in section 59 of the 1995 Act (as amended by the 2003 Act). The court can make a restriction order if, having regard to the nature of the offence of which the offender was convicted, the antecedents of the person and the risk that as a result of mental disorder the offender would commit offences if released, it is satisfied that the order is necessary for the protection of the public from serious harm.

52. The effects of the restriction order are outlined in Part 10 of the 2003 Act. A restriction order may be made only where the compulsion order authorises detention in hospital.

53. A compulsion order can authorise detention in hospital or community based treatment in the same way as a compulsory treatment order.²⁹⁸ However, unlike a compulsory treatment order, there is no provision for a court to specify in the order details of treatment or services which are considered to be appropriate.

²⁹⁵ See section 61(1) of the 1995 Act as amended by the 2003 Act.

²⁹⁶ New section 57A(2), (3) and (4) of the 1995 Act.

²⁹⁷ New section 57A(13) of the 1995 Act.

²⁹⁸ See paragraph 20 above. New section 57A(8) of the 1995 Act.

54. The court cannot impose on the offender:–
- 54.1 an order under section 200 of the 1995 Act;
 - 54.2 an interim compulsion order;
 - 54.3 a guardianship order;
 - 54.4 sentence of imprisonment;
 - 54.5 a fine
 - 54.6 a probation order;
 - 54.7 a community service order,²⁹⁹

at the same time as making a compulsion order³⁰⁰.

Urgent detention of acquitted persons

Power of court to detain acquitted persons

55. The court has the power to detain, for the purpose of a medical examination, a person charged with an offence and who has been acquitted (other than by reason of insanity)³⁰¹.

56. Before it can do so, the court must be satisfied on the evidence of two medical practitioners (one of whom must be an approved medical practitioner)³⁰² that the person meets the assessment conditions³⁰³ and that it is not practicable for a medical practitioner to examine the person immediately.

57. The order authorises the removal of the person to, and the detention of the person in, a place of safety for a period of 6 hours to allow an examination by a medical practitioner.

Probation for treatment of mental disorder

58. The 1995 Act is amended to remove the 12-month maximum time limit on a requirement for treatment for a mental disorder³⁰⁴. This has the effect that such a treatment requirement can now last for up to the 3-year maximum duration of a probation order.

59. Before imposing a requirement of treatment, the court must be satisfied on the evidence from those who provide the service that the service is appropriate and, if the treatment is to be provided in a hospital, that the hospital has made arrangements to receive the offender³⁰⁵.

²⁹⁹ New section 57A(15) of the 1995 Act.

³⁰⁰ New section 57A(15) of the 1995 Act.

³⁰¹ New section 60C of the 1995 Act.

³⁰² Section 61(1) of the 1995 Act (as amended by the 2003 Act).

³⁰³ See paragraphs 29.1.1 to 29.1.3.

³⁰⁴ Section 230 of the 1995 Act as amended by section 135(a) of the 2003 Act.

³⁰⁵ Section 230 of the 1995 Act as amended by section 135(b) of the 2003 Act.

COMPULSION ORDERS

60. Part 9 of the 2003 Act provides a regime for compulsion orders made under new section 57A (2) of the 1995 Act. The regime for compulsion orders which are combined with restriction orders is provided for by Part 10 of the 2003 Act. The regime is similar in many ways to that for compulsory treatment orders (some of the provisions of which it adopts with appropriate modifications) and includes provision for the review of compulsion orders, variation, extension and revocation of them, transfer of mentally disordered persons subject to them and suspension of measures authorised by them. The provisions include mandatory reviews by the responsible medical officer and revocation of the order by the responsible medical officer or the Commission.

ASSESSMENT OF NEEDS

Assessment of needs for community care services etc.

61. Under the 2003 Act³⁰⁶ notification by the mental health officer to a local authority that a mentally disordered person for whom they have a duty or power to provide (or secure the provision of) community care services may be in need of such services triggers the duty of the authority under section 12A of the Social Work (Scotland) Act 1968 to undertake an assessment of needs in relation to that mentally disordered person. Where a mentally disordered person makes a request for an assessment of their needs, the 2003 Act³⁰⁷ imposes a duty on local authorities and health boards to respond within 14 days advising whether they will carry out the assessment and if not why not.

MEDICAL TREATMENT

62. Under the 2003 Act, mentally disordered persons who are subject to short-term detention certificates and offenders subject to various orders imposed by the criminal courts (including treatment orders and interim compulsion orders) are liable to be given medical treatment compulsorily. A mentally disordered person subject to a compulsory treatment order or an interim compulsory treatment order is liable to be given medical treatment compulsorily only if that is specified as a measure in the order. In the case of an offender made subject to a compulsion order, the sentencing court must specify whether the order authorises the giving of medical treatment.

63. Part 5 of the 2000 Act deals with medical treatment for adults who are incapable of giving consent, including those incapacitated through mental disorder. For mentally disordered persons not liable to compulsory treatment under the Act, the provisions of Part 5 of the 2000 Act may still apply, except in respect of neurosurgery for mental disorder and any other treatments specified in Regulations made under section 234 of the 2003 Act. Even where a mentally disordered person is being given medical treatment compulsorily under the 2003 Act, Part 5 of the 2000 Act may still apply to medical treatment for physical conditions not related to the mental disorder.

³⁰⁶ Section 227.

³⁰⁷ Section 228.

64. Patients who are subject to short-term detention certificates and offenders subject to various orders imposed by the criminal courts (including treatment orders and interim compulsion orders) are liable to be given medical treatment compulsorily. A patient subject to a compulsory treatment order or an interim compulsory treatment order is liable to be given medical treatment compulsorily only if that is specified as a measure in the order. In the case of an offender made subject to a compulsion order, the sentencing court must specify whether the order authorises the giving of medical treatment.

65. In addition to the specific requirements set out in the 2003 Act, any medical practitioner giving treatment must have regard to the present and past wishes and feelings of the patient relevant to the treatment, the views of the named person, any carer of the patient, any guardian³⁰⁸ of the patient and any welfare attorney³⁰⁹ of the patient relevant to the treatment, the importance of the patient's participating as fully as possible in the treatment and the importance of providing as much information and support as is necessary to facilitate this participation, and to any advance statement made by the patient³¹⁰.

66. Certain types of medical treatment may be given to a patient only in accordance with the safeguards set out in the 2003 Act³¹¹. Treatment falling into this category is any surgical operation that destroys brain tissue or the functioning of brain tissue (generally known as neurosurgery for mental disorder). The Scottish Ministers must consult appropriate persons before making Regulations specifying other types of medical treatment that will attract the same special safeguards.

Patients capable of consenting

67. The conditions that must be met before these medical treatments may be given to patients who are capable of consenting to treatment are that:

67.1 a designated medical practitioner must confirm both that the patient is capable of consenting and has done so in writing, and that the treatment is in the patient's best interests, having regard to the likelihood of the treatment alleviating or preventing a deterioration in the patient's condition³¹²; and

67.2 two lay persons appointed by the Commission for the purpose, who may interview the patient in private, must certify that the patient is able to consent and has done so in writing³¹³.

Patients incapable of consenting

68. The conditions that must be met before neurosurgery for mental disorder or other treatments specified in Regulations can be given to patients who are incapable of consenting but do not resist or object to receiving the treatment are that—

³⁰⁸ See paragraphs 38 to 48 of Annex C.

³⁰⁹ See paragraphs 10 and 11 of Annex C.

³¹⁰ Sections 1, 275 and 276 of the 2003 Act.

³¹¹ Section 234 of the 2003 Act.

³¹² Section 235(2) of the 2003 Act. If the patient is aged under 16, section 235(6) of the 2003 Act modifies this so that if the patient's responsible medical officer is not a child specialist (as defined in section 249) then the certificate confirming that the patient is capable of consenting and that the treatment is in their best interests, must be given by a designated medical practitioner who is a child specialist.

³¹³ Section 235(3) of the 2003 Act.

68.1 a designated medical practitioner³¹⁴ must certify that this is the case and that the treatment is in the patient's best interests;

68.2 two lay persons appointed by the Commission must certify in writing that the patient is incapable of consenting and that the patient does not object to the treatment; and

68.3 the responsible medical officer must apply to the Court of Session for an order authorising the treatment specified.

The Court of Session may authorise the treatment only if satisfied that, having regard to the likelihood of the treatment alleviating, or preventing a deterioration in, the patient's condition, it is in the best interests of the patient, and the patient does not object to the treatment.

69. A patient who opposes the treatment, either by stating an objection or by resisting treatment, may not be given such treatment.

Safeguards for other medical treatment

Electro-convulsive therapy

70. The 2003 Act provides that electro-convulsive therapy and other types of treatment to be specified in Regulations unless such ECT or other treatment is urgent³¹⁵ may only be given to patients to whom the giving of medical treatment is authorised by virtue of the 2003 Act or the 1995 Act, if it is given in accordance with certain safeguards. The safeguards are the same as those for neuro-surgery except that if a person is incapable of consenting and objects to the treatment, the treatment can be given if the medical practitioner certifies that the treatment is necessary to save the patient's life, to prevent serious deterioration in the patient's condition or to alleviate serious suffering on the part of the patient³¹⁶.

Medicine, nutrition and other treatments given over a period of time

71. Where medical treatment authorised by virtue of the 2003 Act or the 1995 Act comprises giving medicine, providing nutrition without the consent of the patient and by artificial means, or any other treatment specified in Regulations, for more than 2 months the treatment cannot be given unless certain safeguards are met³¹⁷. These are:

71.1 for those who are capable of consenting and do so, those specified for ECT treatment³¹⁸;

³¹⁴ If the patient is aged under 16, section 236(6) of the 2003 Act modifies this so that if the patient's responsible medical officer is not a child specialist (as defined in section 249) then the certificate confirming that the patient is capable of consenting and that the treatment is in their best interests, must be given by a designated medical practitioner who is a child specialist.

³¹⁵ See sections 237(2) and 243.

³¹⁶ Sections 237 to 239 of the 2003 Act. See paragraphs 66 to 69 above.

³¹⁷ Sections 240 to 242 of the 2003 Act.

³¹⁸ See paragraph 70 above.

71.2 for those who are capable of consenting but also refuse consent and for those incapable of consenting, that a medical practitioner certifies that:

71.2.1 the patient is incapable of consenting or does not consent;

71.2.2 the treatment is authorised under the 2003 Act or the 1995 Act; and

71.2.3 it is in the patient's best interests that the treatment should be given, having regard to the likelihood of its alleviating or preventing a deterioration in the patient's condition.

72. The designated medical practitioner is required to take into account the views of a capable patient who refuses consent; and if, having considered those views, the designated medical practitioner is of the opinion that the treatment should still be given he is required to state the reason in the certificate³¹⁹.

73. If the patient is not in hospital, such medical treatment cannot be given by force to the patient³²⁰.

Other treatment

74. The giving of the medical treatment authorised by the 2003 Act or the 1995 Act can be given to patients who are capable of consenting and who consent in writing, provided it is given by or under the direction of the responsible medical officer.

75. For patients who are capable of consenting but do not consent or consent other than in writing and those incapable of consenting, the treatment can only be given if the responsible medical officer decides that it is in the patient's best interests that the treatment is given³²¹.

Urgent medical treatment where patient detained in hospital

76. The 2003 Act specifies the circumstances in which urgent medical treatment, other than ECT which the patient is capable of consenting to but does not consent to, may be administered even to a patient who does not consent, or is incapable of consenting, to the treatment. These are—

76.1 if the purpose is—

76.1.1 to save the patient's life;

76.1.2 to prevent serious deterioration in the patient's condition;

76.1.3 to alleviate serious suffering on the part of the patient;

76.1.4 to prevent the patient from behaving violently or being a danger to the patient or to others

³¹⁹ Section 241 of the 2003 Act.

³²⁰ Section 241(4) of the 2003 Act.

³²¹ Section 242 of the 2003 Act. The considerations to be taken into account are set out in section 242(5) of the 2003 Act.

provided that–

76.1.5 for paragraphs 76.1.2 to 76.1.4 the treatment is not likely to entail unfavourable and irreversible physical or psychological consequences; and

76.1.6 for paragraphs 76.1.3 and 76.1.4 the treatment does not entail significant physical hazard to the patient³²².

77. The responsible medical officer must notify the Commission within 7 days of the treatment first being given to the patient of the type of urgent treatment given to a patient and the purpose for which it was given in such cases

Additional safeguards for certain informal patients

78. The Scottish Ministers can make Regulations setting out the conditions to be satisfied before types of medical treatment set out in the Regulations can be given to informal patients (ie patients to whom the giving of medical treatment is not authorised by the 2003 Act or the 1995 Act) under 16 years of age³²³.

79. Before giving a certificate which allows treatment to proceed, the certifying medical practitioner must consult the patient, the patient's named person (where practicable) and those persons appearing to have the primary responsibility for the patient's medical treatment. The certificate must be copied to the Commission within 7 days³²⁴.

MENTALLY DISORDERED PERSON REPRESENTATION

Named persons

80. The 2003 Act³²⁵ supplements the provisions of the 2000 Act by permitting the appointment of, or identifying, a named person to represent the interests of and support a mentally disordered person subject to proceedings under the 2003 Act. Broadly speaking, the named person has similar rights to the mentally disordered person to appear and be represented at tribunal hearings concerning compulsory treatment orders, and to appeal against short-term detention. The named person is also entitled to be given information concerning compulsory measures which have been taken or are being sought. The named person and the mentally disordered person are, however, each entitled to act independently of the other and the named person does not “step into the shoes” of the mentally disordered person.

³²² Section 243 of the 2003 Act.

³²³ Section 244 of the 2003 Act.

³²⁴ Section 245 of the 2003 Act.

³²⁵ Sections 250 to 257 of the 2003 Act.

Advocacy

81. The 2003 Act³²⁶ introduces a new duty on local authorities and health boards to ensure the provision of independent advocacy services to all mentally disordered people within their areas³²⁷. The local authorities and health boards must collaborate with each other to provide the service and take steps to ensure that mentally disordered persons in their areas have the opportunity of making use of the services provided. “Advocacy services” is defined as “services of support and representation made available for the purpose of enabling those to whom they are available to have as much control of, or capacity to influence, that person’s care and welfare as is, in the circumstances, appropriate”.³²⁸

Information

82. The 2003 Act³²⁹ requires arrangements to be made to ensure that managers of hospitals in which the mentally disordered person is treated under a compulsory treatment order or in which the mentally disordered person is detained are aware of their situation and their rights.

Assistance with communication and access to a doctor

83. The 2003 Act³³⁰ introduces a duty on managers of the hospital in which the person is detained or which is responsible for a person’s treatment under a compulsory treatment order to provide assistance with communication where the mentally disordered person has difficulty communicating or generally communicates in a foreign language. The 2003 Act³³¹ also gives a person who is detained under the 2003 Act the right to see a doctor and for that doctor to have access to the person’s medical records for the purpose of advising them on applications to the Tribunal under the 2003 Act.

Education of persons who have mental disorder

84. The 2003 Act³³² requires education authorities to make arrangements to provide school education for children unable to attend school because they are subject to measures authorised by the 2003 Act.

ENTRY, REMOVAL AND DETENTION POWERS

85. The 2003 Act³³³ provides powers to allow authorised persons to enter premises in order to take a mentally disordered person to a place of safety, to another specified place, or into custody, and for those authorised persons to remove a mentally disordered person to a place of safety. It also confers on certain classes of nurse, the power to detain certain

³²⁶ Section 259.

³²⁷ The State Hospitals Board for Scotland must secure independent advocacy services for mentally disordered persons detained in a state hospital, and to take steps to enable those mentally disordered persons to use the services: section 259(7) of the 2003 Act.

³²⁸ Section 259(4) of the 2003 Act.

³²⁹ Section 260. This is broadly comparable to section 110 of the 1984 Act.

³³⁰ Section 261.

³³¹ Section 262 and 263.

³³² Section 277 which amends the relevant education legislation.

³³³ Section 292 to 299 of the 2003 Act.

categories of mentally disordered person for up to 2 hours for the purpose of having a medical practitioner undertake an examination of the mentally disordered person.

Entry to premises

86. The 2003 Act³³⁴ allows a sheriff or justice of the peace to grant a warrant authorising someone who already has authority to take a mentally disordered person to any place or into custody, to enter premises specified in the warrant if:

86.1 it is necessary to enable the authorised person to fulfil the purpose for which they had previously been authorised; and

86.2 the sheriff or justice of the peace is satisfied the authorised person cannot obtain, or cannot reasonably expect to obtain, entry to those premises.

The warrant may also authorise a local constable to open lockfast places on the premises where this is necessary to gain entry³³⁵.

Removal orders for those at risk

87. A removal order may be granted under the 2003 Act³³⁶ where the sheriff³³⁷ is satisfied that a person over the age of 16 has a mental disorder, is “at risk” within the meaning in paragraph 11 above, and is likely to suffer significant harm if not removed to a place of safety. A removal order authorises the removal of that person to a specified place of safety and their detention in that place for a specified period of up to 7 days. The removal order may also grant authority to enter premises and to open lockfast places.³³⁸

Removal to a place of safety from a public place

88. The 2003 Act³³⁹ retains the power of police constables to remove from a public place a person who appears to be mentally disordered and who appears to be in immediate need of care or treatment, to a place of safety³⁴⁰ (or a police station if no place of safety is available). Anyone removed from a public place under this power can be detained for up to 24 hours to enable the person to be medically examined and any necessary arrangements to be made for the person’s care and treatment.

³³⁴ Section 292.

³³⁵ This provision mirrors the power in section 117(3) of the 1984 Act.

³³⁶ Section 293.

³³⁷ Or a Justice of the Peace in an emergency: section 294 of the 2003 Act.

³³⁸ This replaces section 117 of the 1984 Act.

³³⁹ Sections 297 and 298 of the 2003 Act and section 118 of the 1984 Act.

³⁴⁰ Place of safety is defined as a hospital, premises which are used for the purpose of providing a care home service or any other suitable place (other than a police station) the occupier of which is willing temporarily to receive mentally disordered persons: section 300 of the 2003 Act.

Nurse's power to detain pending medical examination

89. The 2003 Act³⁴¹ introduces a new power for nurses³⁴² to detain people who have or appear to have a mental disorder and who are already in hospital receiving treatment for mental disorder either voluntarily or because of an order under section 228(1) of the 1995 Act. The person can be detained for up to 2 hours so that they can be assessed to see whether they should be detained under the 2003 Act, where a doctor is not available to examine the person immediately. The power can be used where it appears to be necessary for the protection of the health, safety or welfare of either that person or of the safety of any other person to prevent the person from leaving the hospital.

Offences

90. The 2003 Act re-enacts with minor amendments the specific offences against those with a mental disorder which are already present in the 1984 Act. These offences all cover those who have a learning disability (whether on its own or with other mental disorders).

Non-consensual sexual acts

91. The 2003 Act recognises that some mentally disabled people will be able to consent to sexual acts³⁴³ and recognises that mentally disordered men require similar protection from sexual abuse as mentally disordered women. The 2003 Act³⁴⁴ therefore creates an offence of engaging in a sexual act³⁴⁵, with a mentally disordered person who does not consent or is incapable of consenting to that act by reason of their mental disorder. It applies to any mentally disordered person of either gender and whatever their type of mental disorder³⁴⁶. A mentally disordered person will be regarded as not having consented to a sexual act where the purported consent has been given as a result of the mentally disordered person being frightened, threatened, intimidated or tricked³⁴⁷. There is a defence to prosecution that the accused did not know, and could not reasonably be expected to have known, both that the mentally disordered person had a mental disorder and was incapable of consenting³⁴⁸.

Persons providing care services: sexual offences

92. Under the 2003 Act³⁴⁹ it remains an offence for a carer or a member of staff, or someone working in or managing a hospital to engage in a sexual act with a mentally disordered person for whom he or she cares³⁵⁰. There is a defence available to an accused

³⁴¹ Section 299.

³⁴² The types of nurse entitled to use this power will be prescribed in Regulations: section 299(2) of the 2003 Act.

³⁴³ Under section 106 of the 1984 Act it is an offence to have unlawful sexual intercourse with a mentally handicapped woman. The section may also have made it an offence to give sex education or advice on contraception for such women. Homosexual abuse of learning disabled men is an offence under section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39).

³⁴⁴ Section 311.

³⁴⁵ As defined in section 311(2) of the 2003 Act.

³⁴⁶ Unlike section 106 of the 1984 Act, which was restricted to sexual intercourse and could only be committed by a man on a mentally impaired woman.

³⁴⁷ Section 311(3) of the 2003 Act.

³⁴⁸ Section 311(5) of the 2003 Act.

³⁴⁹ Section 313.

³⁵⁰ The corresponding offence under section 107 of the 1984 Act also includes committing a homosexual act: section 17(3) of the 1984 Act.

who did not know, or could not reasonably be expected to have known, that the mentally disordered person was mentally disordered, or that they were married.³⁵¹ It is also a defence for the accused to prove that there was an ongoing sexual relationship between them before the person began to care for the mentally disordered person or before the mentally disordered person was admitted to hospital³⁵².

Ill treatment and wilful neglect of a mentally disordered person

93. Under the 2003 Act³⁵³ it will continue to be an offence for a carer or a member of staff, or someone working in or managing a hospital, to ill-treat or wilfully neglect a mentally disordered person³⁵⁴.

³⁵¹ Section 313(3) of the 2003 Act. This defence was not available under the 1984 Act.

³⁵² Section 313(3) of the 2003 Act. This defence was not available under the 1984 Act.

³⁵³ Section 315.

³⁵⁴ See section 105 of the 1984 Act.

List of Consultation Questions

These are in addition to any revised comments that you may wish to make on the questions on the 2002 consultation at Annex A:

Question 1: Do you agree with the revised definition of a vulnerable adult?

Question 2: If you do not agree with the revised definition of a vulnerable adult, what changes do you think require to be made of it?

Question 3: Do you agree with the definition of abuse?

Question 4: If you do not agree with the definition of abuse, what changes do you think require to be made?

Question 5: Do you agree that Adult Protection Committees should lead the investigation of abuse, including investigations of abuse in regulated care services?

Question 6: If you do not agree, what objections do you have and what alternatives do you consider possible or desirable?

Question 7: Should the structure and powers of Adult Protection Committees be defined in statute or a statutory instrument or not?

Question 8: When abuse of a vulnerable adult is proved, what risk assessment and management should take place?

Question 9: Do you agree that mediation should be offered to all those who are subject to abuse? If you do not agree, please state your key reservations.

Question 10: If mediation were to be offered, how could this be done?

Question 11: Do you agree that guardianship is the most appropriate method to protect and control some people with a learning disability who may also exhibit challenging behaviours?

Question 12: If you do not agree, what alternative methods could be provided other than detention under the 2003 Act?

Question 13: Is it preferable to make a different provision for the compulsory care of people with a learning disability outwith the 2003 Act?

Question 14: What would the implications of change be in practice?

Closing date for responses Friday 23 September 2005

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2. Department of Health (2000) *No Secrets*
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